BUSING JALI & ORS v. KERAJAAN NEGERI SARAWAK & ANOR AND OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR CJ (SABAH & SARAWAK)
VERNON ONG LAM KIAT FCJ
ZABARIAH MOHD YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
HARMINDAR SINGH DHALIWAL FCJ
[CIVIL APPEAL NOS: 01(f)-31-10-2019(Q); 02(f)-77-10-2019(Q); 01(f)-32-10-2019(Q); 01(i)-33-10-2019(Q); 02(i)-79-10-2019(Q) & 02(f)-76-10-2019(Q)]
24 NOVEMBER 2021

Abstract – *The call for the apex court to revisit or review its decision in Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 (TR Sandah 1) is legally unsustainable.*

TR Sandah 1, which ruled that the customs of Pemakai Menoa and Pulau Galau were customs that the laws of Sarawak did not recognise as forming part of the laws of the natives of Sarawak, and as such, were customs which had no force of law as envisaged under art. 160(2) of the Federal Constitution, had not been decided per incuriam, and nor had it conflicted with any other decisions of this court. The ruling, which had since gone through at least three judicial scrutinies by this court, was based on an extensive assessment of the laws, both written and unwritten, and the differences, if any, between the judges therein had only to do with their individual interpretation and construction of those laws. The differences being matters of opinion, it is not appropriate for this court to determine whether they had interpreted or applied the law correctly.

The ruling in TR Sandah 1 had also been addressed through legislative intervention by way of amendments made to the Land Code (Sarawak) (Cap 81) in 2018, which recognised Pemakai Menoa and Pulau Galau as customs having the force of law under s. 6A thereof, but which, for inclusiveness, was termed Native Territorial Domain (NTD). This said, sub-s. 6 of s. 6A in respect of NTD in effect provides a 'saving clause' to decisions that had been finally decided by the courts prior to 1 August 2019 such as TR Sandah 1. It follows that the majority ruling on Pemakai Menoa and Pulau Galau in TR Sandah 1 stood as good law from the date of its decision on 20 December 2016 until 31 July 2019. It follows further that all final decisions following TR Sandah 1 handed down before 1 August 2019 were, by necessary implication similarly preserved.

LAND LAW: *Native customary rights – Claim for – Whether natives acquired individual or communal native customary right over State land – Codification of customary practices – Whether given force of law by amendment to Land Code (Sarawak) (Cap 81) ('SLC') – Whether Pemakai Menoa and Pulau Galau statutorily recognised within scheme of SLC – Whether term 'Native Territorial Domain' used for inclusiveness – Whether confers native communal title in perpetuity – Whether proprietary interest indefeasible – Whether date of coming into force of amendments given importance – Whether have effect of statutorily overturning majority decision in Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals – Whether natives' rights confined to area settled – Land Code (Sarawak) (Cap 81), ss. 5, 6A & 132*

NATIVE LAW AND CUSTOM: *Land dispute – Native customary rights – Whether natives acquired individual or communal native customary right over State land – Codification of customary practices – Whether given force of law by amendment to Land Code (Sarawak) (Cap 81) ('SLC') – Whether Pemakai Menoa and Pulau Galau statutorily recognised within scheme of SLC – Whether term 'Native Territorial Domain' used for inclusiveness – Whether confers native communal title in perpetuity – Whether proprietary interest indefeasible – Whether date of coming into force of amendments given importance – Whether have effect of statutorily overturning majority decision in Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals – Whether natives' rights confined to area settled – Land Code (Sarawak) (Cap 81), ss. 5, 6A & 132*

WORDS & PHRASES: *'subject to this Code' – Land Code (Sarawak) (Cap 81), s. 132(1) – Phrase 'subject to' appearing in three other places in Code – Whether to be given same meaning throughout statute – Whether 'subject to this Code' makes native customary right as qualifying factor to indefeasibility of title*

The main commonality of issues in the cases on appeal herein had been the very subject matter of dispute – the native customary right ('NCR') in Sarawak; and the questions of law for this court's determination – on matters relating to the Federal Court decisions in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* ('*TR Sandah 1*'); *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* ('*TR Nyutan*'); and the Court of Appeal decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Nyawai & Ors And Another Appeal* ('*Nor Nyawai*') *vis-à-vis* the 2018 amendments to the Land Code (Sarawak) (Cap 81) ('SLC').

In Case A, the High Court decided that the appellants had acquired and/or created individual or communal NCR over 1391.42 acres of land within the 4460 hectares more or less of the provisional lease, having satisfied that the appellants had proved the NCR of *Pemakai Menoa* and *Pulau Galau* over the said land. The decision was reversed on appeal wherein the Court of Appeal ruled that based on the decision of *TR Sandah 1*, the customary practices of *Pemakai Menoa* and *Pulau Galau* were not customs or usages having the force of law in the Sarawak State laws as defined in art. 160(2) of the Federal Constitution. The Court of Appeal further stated that the customary practices

of *Pemakai Menoa* and *Pulau Galau* must be for the whole community, and since the claim was not a representative action but was only for the seven appellants, it must necessarily fail. It was this aspect of the Court of Appeal's decision that the appellants sought this court's consideration to answer additional question as to 'whether the claim for NCR based on *Pemakai Menoa* and *Pulau Galau* must be for the whole community and not for the appellants only'. In Case B, where a representative action brought on behalf of the claimants and all others who claimed NCR, the High Court found that the appellants had successfully proved that they had acquired, created and/or inherited NCR prior to the 1 January 1958 over the disputed areas of 8,001 hectares over which the forest timber licence and leases were issued. However, in view of the earlier judgment in *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* on indefeasibility of titles, the judge varied the earlier order and decided that an award of general damages to be assessed against the respondents for loss of the appellants' NCR over the entire disputed areas which had been alienated to the licensee and lessees. On appeal, the Court of Appeal decided that the appellants were only entitled to the NCR over the 300 hectares of cultivation mosaics – the agreed *temuda*, but not to the entire areas of *Pemakai Menoa* and *Pulau Galau*, based on the decision of the Federal Court in *TR Sandah 1*. In Case C, the High Court allowed the application by the plaintiff, Asco Green Sdn Bhd, for a summary judgment under O. 14A of the Rules of Court 2012 ('ROC') as well as striking out the appellants' defence and counterclaim under O. 18 r. 19 of the ROC as well as the third parties' application for striking out of the appellants' statement of claim. Judgment was also entered against the appellants under O. 14A that: (i) Asco Green, as the registered proprietor of an area approximately 707 hectares for the lease of the said land holds an indefeasible title; (ii) the disputed area of Lot 130 was a primary forest in 1947 and 1963 with no proof of cultivation or settlement; and (iii) the claim of NCR over the area for foraging food, deriving valuable medicines, wildlife and other forest produce for livelihood and sustenance in the context of *Pemakai Menoa* and *Pulau Galau* were not maintainable because they were customs that had no force of law as ruled by the Federal Court in *TR Sandah 1*. The decision was upheld by the Court of Appeal. In Case D, the respondent claimed against each appellant for, *inter alia*, vacant possession and quiet enjoyment of the lands held on lease. The claim was allowed and the appellants' counterclaim of NCR over the disputed areas was dismissed, primarily due to the unsatisfactory and to a certain extent, contradictory evidence. It was held, in light of the decision in *TR Sandah 1*, the NCR claim does not extend to areas where the natives used to roam to forage for their livelihood. Moreover, there was no evidence of the said lands being cleared or cultivated before 1 January 1958 for the said lands were a virgin forest in 1951 and remained the same in 1961. The High Court Judge also found that the respondent, as the registered proprietor, held indefeasible title over the disputed lands which title was not shown on evidence to have been issued fraudulently or without complying to due processes. The Court of Appeal unanimously confirmed the findings mainly

based on the application of the Federal Court's decision in *TR Sandah 1* on *Pemakai Menoa* and *Pulau Galau*; and *TR Nyutan* on indefeasibility of title. The Court of Appeal further noted that amendments to the Land Code in ss. 6A and 28 have no bearing on the case as the amendments took effect only on 1 August 2019.

The questions for determination were as follows: (i) Case A: whether it is correct in law or proper for the Court of Appeal to set aside the trial judge's finding of fact that the plaintiffs had acquired and/or created individual or communal NCR over State land in Sarawak on the application as a matter of law of the decision in *TR Sandah 1*; (ii) Case B: whilst the customary practices of *Pemakai Menoa* and *Pulau Galau* do not appear in any codified law under the Rajahs, their existence had been acknowledged in the reports and historical texts, whereas it is axiomatic that customary rights do not owe their existence to statute; instead, they are recognised as a source of unwritten laws, and as such, whether the majority decision of the Federal Court in *TR Sandah 1* with respect to customary practices of *Pemakai Menoa* and *Pulau Galau* should be reviewed, and overturned, and *Pemakai Menoa* and *Pulau Galau* restored as customary practices having the force of law; (iii) Case C: (a) whether the Court of Appeal's decision in *Nor Nyawai* that the rights of the natives are confined to the area where they settled and not where they foraged for food is a correct statement of law relating to the extent and nature of rights to land claimed under NCR in Sarawak; (b) whether the alleged practice of the Iban to preserve an area of jungle or forests as '*Pulau*' for access for food, wild life and forest produce, gives rise to exclusive rights to the land in the '*Pulau*'; (c) whether an extinguishment exercise of NCR over land as provided under s. 15 of the SLC is required prior to the alienation of lease of State land; and (d) if the answer to (c) is in the positive, whether the lease of State land alienated without prior extinguishment of NCR is therefore null and void and/or the areas encumbered with NCR to be excised out or excluded from the lease of State land; and (iv) Case D: whether the Federal Court should depart from the decision of the Federal Court in *TR Sandah 1* on the question of *Pemakai Menoa* and *Pulau Galau* having no force of law and that of *TR Nyutan* on the indefeasibility of the lease of State land and if so, whether those cases had any significant bearing on the decision of the Judicial Commissioner in any event.

Held (dismissing appeals in Case A and Case D; reverting Case B and Case C to Court of Appeal and High Court, respectively)
Per Abang Iskandar CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The application of r. 137 of the Rules of the Federal Court 1995 must be in very exceptional circumstance. Although the words used were review, overturn, restore and depart, the questions have the effect, in pith and substance, of questioning the correctness or otherwise of those very decisions in *TR Sandah 1*, *TR Nyutan* and *Nor Nyawai*. The

A main controversial decision of the majority in *TR Sandah 1* was the ruling by Raus Sharif PCA (as he then was) that the customs of *Pemakai Menoa* and *Pulau Galau* are customs that the laws of Sarawak do not recognise as forming part of the customary laws of the natives of Sarawak and as such, they were customs which had no force of law
B as envisaged under art. 160(2) of the Federal Constitution. Such view effectively affirmed what the Court of Appeal held in *Nor Nyawai* that the rights of the natives are confined to the area where they settled and not where they foraged for food, as a correct statement of the law relating to the extent of natives' rights to land claimed under NCR in
C Sarawak. An application to review the decision was dismissed by the Federal Court ('*TR Sandah 2*'). (paras 32, 35 & 40-42)

(2) The factors where the apex court may depart from its earlier decisions were: (i) existence of conflicting decisions of the Federal Court over the same subject matter; and (ii) decision made *per incuriam*. Both
D factors were absent in the present case. *TR Sandah 1* had gone through at least three judicial scrutinies in *TR Sandah 2*, *Jeli Naga* and *Binglai Buassan & Ors v.. Entrep Resources Sdn Bhd & Ors (unreported)* and in these cases, the ruling on *Pemakai Menoa* and *Pulau Galau* was not shown to be made *per incuriam*. There was also no prior Federal Court
E decision in direct conflict with *TR Sandah 1*. Therefore, the need to ask the question whether there was a necessity to revisit or review *TR Sandah 1* did not arise. (paras 57, 60 & 61)

(3) The ruling on *Pemakai Menoa* and *Pulau Galau* was based on an extensive assessment of the laws – both written and unwritten. And the
F differences, if any, between the judges in *TR Sandah 1* were due to their individual interpretation and construction of the written laws *vis-à-vis* the unwritten law – the customary law. It was therefore not appropriate for this court to determine whether or not they interpreted or applied the law correctly, for that is a matter of opinion. Moreover,
G the ruling in *TR Sandah 1* has been addressed through a legislative intervention by way of amendments made to the SLC in 2018. (paras 63 & 64)

(4) One of the objectives of the 2018 amendments is to statutorily recognise *Pemakai Menoa* and *Pulau Galau* within the scheme of the
H present SLC, as customs having the force of law in s. 6A – but which is termed as Native Territorial Domain ('NTD') for inclusiveness, on which a native communal title in perpetuity will be conferred and be treated as any title granted under the SLC and the proprietary interest in that title would be indefeasible by virtue s. 132 of the SLC. The key
I aspects of s. 6A, apart from the legal recognition of *Pemakai Menoa* and *Pulau Galau*, is the issuance of native communal title in perpetuity, free of any premium, rent or other charges, in the name of a person or body of persons in trust for the native community named therein.

And although the claim is limited for up to 500 hectares or 1,000 hectares accordingly, the NTD rights exercisable within the NTD may be claimed above and over a NCR under s. 5 of the SLC. (paras 71 & 72)

(5) Sub-section 6 is a crucial provision for it places importance on the date of in force of the amendment – 1 August 2019, and the finality of the court's decision in respect of a claim on NTD. Above all else, the customary practices of *Pemakai Menoa* and *Pulau Galau* had been given statutory recognition, having the force of law, the very crucial element that was found wanting or lacking by the Federal Court decision of *TR Sandah 1* and *TR Sandah 2* that had denied those customary practices legal enforceability. This provision prevents a claim for NTD to be made or allowed on any area or land where there is a final decision by a court of competent jurisdiction prior to 1 August 2019. The final decision in this provision refers to a decision by the highest court of the land – the Federal Court; and not by the trial High Court or the Court of Appeal, because any decision obtained at these two stages are appealable further rendering their decision as not a 'final decision' within the meaning of s. 6A(6). Hence, the 2018 amendments have the effect of statutorily overturning the ruling in *TR Sandah 1* in respect of *Pemakai Menoa* and *Pulau Galau* effectively on 1 August 2019. (paras 74, 75, 77 & 79)

(6) Hence: (i) question of law in Case A was answered in the affirmative. When the Court of Appeal heard and decided the appeal on 13 July 2017, it was still legally bound by the principle of *stare decisis* to follow the ruling of the Federal Court made on 20 December 2016; (ii) the question of law in Case B was answered in the negative. *Pemakai Menoa* and *Pulau Galau* are customs having statutory force in the current scheme of a communal title in s. 6A of the SLC as opposed to individual title; (iii) question (a) in Case C was answered in the affirmative. There was no valid reason for reviewing or revisiting the correctness or otherwise of the Court of Appeal decision, especially when this matter had been put to rest by the 2018 amendments to the SLC; and question (b) in Case C was answered in the negative; and (iv) first part of question in Case D was answered in the negative. Further, there was no reason for reviewing or revisiting the case of *TR Sandah 1* and *TR Nyutan* and hence, the application of these decisions by the courts below, in their decisions which were made prior to the date of in force of the 2018 amendments to the SLC, was correct and proper as those decisions stood as good law until the legislative intervention. (paras 81-89)

(7) Questions (c) and (d) in Case C and part of the question posed in Case D were related to the issue of indefeasibility of title and extinguishment of NCR in these appeals. In *TR Nyutan*, the Federal

Court held that unless there is proof of fraud, 's. 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it could be shown that NCR had been created over land in the manner prescribed under the same Code. A claim for NCR does not defeat the indefeasibility of title of land, even though the interest stated in the issue document of title was issued after NCR was asserted.' The Federal Court further held that 'the proper remedy for the infringement of NCR as a result of the issuance of title or alienation of NCR, where such rights subsist without extinguishment thereof, is an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties.' (paras 90-92)

(8) The words in the phrase 'subject to' must be a factor to be considered in interpreting any section in a statute. The variations that exist in construing the meaning of the words 'subject to' show that interpreting the said words is not entirely free from difficulty despite its seemingly innocuous brevity, as expressed in just a two-word phrase. On the one hand, it is treated as qualifying, restricting or conditioning the application of a provision, and on the other hand, it is treated as merely linking a provision to another which is to be read and applied, if and where relevant, without making a provision overriding another. (paras 102, 104 & 111)

(9) The words 'subject to this Code' appear not only in s. 132(1) but also in three other places in the SLC. Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation. Hence, when the same words or expressions appear more than once in a statute, they should receive the same meaning unless the context suggests otherwise, or a contrary intention inevitably or irresistibly appears. In the context of the present case, the phrase employed in the beginning of s. 132 of the SLC is 'subject to this Code'. The Code refers to the SLC in its entirety and SLC deals not only with NCR but a variety of other matters, amongst others, alienation, registration, procedural provisions, power conferring provisions, entitlements, rights and liabilities, offences and dispute resolution provisions. (paras 116, 118 & 119)

(10) An interpretation of a statutory provision that leads to unpredictable, ambiguous result ought to be avoided. In the absence of a clear and unambiguous express provision to the effect, the NCR does not, in the scheme of the SLC, make a qualifying factor to indefeasibility of title. As it stands now, fraud is the only stated factor, if pleaded and established by the party who asserts it, that could render a registered title defeasible. The apex court had so concluded in *TR Nyutan*'s case that the remedy open to the aggrieved party lies in damages by way of compensation, under s. 197 of the SLC. The 2018 amendments introduced the concept of deferred indefeasibility of title for provisional lease – and not a lease proper – as the legislative response

to the controversial issue of indefeasibility of title and the question of extinguishment of NCR resulting from the decision of the Federal Court in *TR Nyutan*. (paras 121 & 124-126)

(11) The 2018 amendments prohibit alienation of State land before a completion of a survey, which shall allow exclusion of NCR under s. 5 or NTD under s. 6A from the area covered by the provisional lease and denial of registration of a lease proper if the area is already held under NCR or NTD respectively. Consequently, anyone holding a provisional lease shall not be entitled to an indefeasibility of title under s. 132 of the SLC. The SLC is clearly protective of NCR whereby alienation of State land or use for a public purpose are prohibited for land which is encumbered with NCR lawfully created under s. 5 or land which has been issued with native communal title under s. 6A until and unless all NCR have been surrendered or extinguished or provisions for compensating the persons entitled thereto have been made. The question as to whether an extinguishment exercise of NCR over land as provided under s. 15 of the SLC is required prior to the alienation of lease of State land was answered in the affirmative. (paras 127, 128 & 131)

(12) However, there was no provision under s. 15 of the SLC on the aspect as to whether the lease of State land alienated without prior extinguishment of NCR is therefore null and void and/or the areas encumbered with NCR to be excised out or excluded from the lease of State land. It was necessary to look at the entire SLC relating to the issues of extinguishment, indefeasibility of title and NCR in order to understand their relationships within the scheme of the Land Code as a whole, bearing in mind the 2018 amendments that mandated the exclusion of NCR under s. 5 or NTD under s. 6A in provisional lease prior to its registration to a lease proper. Further, any native who is deprived of his NCR by reason of alienation may find the remedy in s. 197 of the SLC. Taking into consideration the legislative intervention in curing the effects of *TR Nyutan*, the question framed as to 'whether the Federal Court should depart from the decision of *TR Nyutan*' shall be answered in the negative. (paras 131, 132, 133, 135 & 137)

(13) A legislative change in a statute is not intended to have a retrospective effect 'unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction ...'. There is, however, a stark difference between the effects of a judicial ruling and that of a statute in respect of their retrospectivity and prospectivity. There is a limitation in the retrospectivity of a judicial ruling. Any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It

A certainly does not apply to cases already disposed of at the highest appellate level. The court was bound to adopt the current regime of the statutory law – the SLC – not only to cases which are yet to be filed with the courts, but also 'to all pending cases and all those cases still under appeals within our court system'. (paras 141, 143, 144, 147 & 152)

B

(14) As at 1 August 2019, s. 6A of the SLC shall be the governing provision on NTD – or what is commonly referred to as *Pemakai Menoa* and *Pulau Galau* for the Iban community; and from that same date onwards, the ruling in *TR Sandah 1* that *Pemakai Menoa* and *Pulau* C *Galau* has no force of law, is no longer a valid authority; and the court is duty-bound to give effect to the statutory law, as contained under s. 6A. Considering that these appeals were commenced under s. 5 of the SLC and proceeded throughout when the amendments had already been in force, given the peculiar circumstances of these appeals, s. 6A D of the SLC, in particular sub-s. 6, must be applied. The decisions of the Court of Appeal were not final. (paras 155 & 157)

(15) Hence, it was held: (i) Case A: considering the communal nature of *Pemakai Menoa* and *Pulau Galau* in s. 6A, an individual claim, as opposed to communal claim, could not be sustained. The appeal in E respect of Case A ought to be and was dismissed; (ii) Case B: with the coming into force of s. 6A, this appeal ought to be sent back to the Court of Appeal for a finding of fact specifically on the area where *Pemakai Menoa* and *Pulau Galau* were situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of F *Pemakai Menoa* and *Pulau Galau* accordingly allowed under s. 6A. Any such finding would be relevant for the purpose of compensation under s. 197 of the SLC to the appellants who might have been deprived of their rights by reason of alienation of the lands to third parties; (iii) Case C: the summary disposal of the claim by the appellants G against the third party was improper merely based on the affidavit evidence. Evidence needs to be led *viva voce* subject to due cross-examination by adverse parties. And for this reason, this case was reverted to the High Court to be fully heard as between the appellants and the third party specifically on the question of whether there was NCR created or existed on the alienated land which entitled the H appellants for compensation; and (iv) Case D: Upon perusal of both the judgments of the High Court and the Court of Appeal, the court was satisfied that the concurrent findings had been that there was no NCR created nor existed over the land concerned. There was no reason to disturb such findings by both the courts below. The I decisions of the High Court and the Court of Appeal were affirmed, and this appeal was therefore dismissed. (paras 160-169)

Bahasa Melayu *Headnotes*

Persamaan utama isu-isu dalam kes-kes dalam rayuan-rayuan di sini adalah perkara pertikaian itu sendiri – hak adat anak negeri ('NCR') di Sarawak dan soalan-soalan undang-undang untuk pertimbangan mahkamah ini – atas perkara-perkara berkaitan keputusan Mahkamah Persekutuan dalam *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* ('*TR Sandah 1*'); *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* ('*TR Nyutan*'); keputusan Mahkamah Rayuan dalam *Superintendent Of Lands & Surveys, Bintulu v. Nor Nyawai & Ors And Another Appeal* ('*Nor Nyawai*') berbanding pindaan pada Kanun Tanah Sarawak ('KTS') pada 2018.

Dalam Kes A, Mahkamah Tinggi memutuskan perayu-perayu memperoleh dan/atau membentuk NCR individu atau kaum atas 1391.42 ekar tanah dalam lingkungan lebih kurang 4,460 hektar pajakan sementara, setelah berpuas hati bahawa perayu-perayu telah membuktikan NCR berkaitan *Pemakai Menoa* dan *Pulau Galau* atas tanah itu. Keputusan tersebut diakas atas rayuan apabila Mahkamah Rayuan memutuskan bahawa berdasarkan kes *TR Sandah 1*, amalan adat *Pemakai Menoa* dan *Pulau Galau* bukan adat atau kegunaan yang mempunyai kuat kuasa undang-undang dalam undang-undang Negeri Sarawak seperti yang ditafsirkan dalam per. 160(2) Perlembagaan Persekutuan ('PP'). Mahkamah Rayuan selanjutnya menyatakan bahawa amalan adat *Pemakai Menoa* dan *Pulau Galau* semestinya untuk kaum itu keseluruhannya, dan oleh sebab tuntutan tersebut bukan tindakan wakil tetapi hanya untuk tujuh perayu, itu wajar gagal. Dalam aspek keputusan Mahkamah Rayuan ini, perayu-perayu memohon pertimbangan mahkamah ini untuk menjawab soalan tambahan 'sama ada tuntutan untuk NCR berdasarkan *Pemakai Menoa* dan *Pulau Galau* mesti untuk kaum itu secara keseluruhannya dan bukan hanya untuk perayu-perayu'. Dalam Kes B, apabila tindakan representatif dimulakan bagi pihak penuntut-penuntut dan yang lain yang menuntut NCR, Mahkamah Tinggi mendapati perayu-perayu berjaya membuktikan bahawa mereka memperoleh, membentuk dan/atau mewarisi NCR sebelum 1 Januari 1958 atas 8,001 hektar kawasan yang dipertikaikan yang terhadapnya lesen-lesen pembalakan dan pajakan dikeluarkan. Walau bagaimanapun, berdasarkan penghakiman terdahulu dalam *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* berkaitan ketaksangkalan hak milik, hakim membezakan perintah terdahulu dan memutuskan bahawa award ganti rugi am ditaksir terhadap responden-responden untuk kerugian NCR perayu-perayu terhadap keseluruhan kawasan yang diberi milik kepada pemegang-pemegang lesen dan gadaian. Atas rayuan, Mahkamah Rayuan memutuskan bahawa perayu-perayu hanya berhak untuk NCR atas 300 hektar pengusahaan mozek – *temuda* yang dipersetujui, tetapi bukan keseluruhan kawasan *Pemakai Menoa* dan *Pulau Galau*, berdasarkan keputusan Mahkamah Persekutuan dalam *TR Sandah 1*. Dalam Kes C, Mahkamah Tinggi membenarkan permohonan oleh plaintif, Asco Green Sdn Bhd, untuk penghakiman terus bawah A. 14A Kaedah-

kaedah Mahkamah 2012 ('KKM') serta pembatalan pembelaan perayu-perayu dan tuntutan balas bawah A. 18 k. 19 KKM serta permohonan pihak ketiga untuk membatalkan pernyataan tuntutan perayu-perayu. Penghakiman juga dimasukkan terhadap perayu-perayu bawah A. 14A bahawa: (i) Asco Green, sebagai pemilik berdaftar kawasan lebih kurang 707 hektar untuk pajakan tanah tersebut memegang hak milik tak boleh sangkal; (ii) kawasan yang dipertikaikan di Lot 130 adalah hutan primer pada 1947 dan 1963 tanpa bukti penanaman atau pendudukan; dan (iii) tuntutan NCR atas kawasan untuk mencari makanan, menghasilkan ubat-ubatan bernilai, hidupan liar dan hasil hutan lain sebagai mata pencarian dan kehidupan dalam konteks *Pemakai Menoa* dan *Pulau Galau* tidak boleh dikekalkan kerana itu adalah adat yang tiada kuat kuasa undang-undang seperti yang diputuskan oleh Mahkamah Persekutuan dalam *TR Sandah 1*. Keputusan itu disahkan oleh Mahkamah Rayuan. Dalam Kes D, responden menuntut terhadap setiap perayu untuk, antara lain, milikan kosong dan pemanfaatan penuh tanah-tanah yang dipegang atas pajakan. Tuntutan itu dibenarkan dan tuntutan balas perayu-perayu untuk NCR atas kawasan yang dipertikaikan, ditolak, pada asasnya disebabkan keterangan yang tidak memuaskan dan pada tahap tertentu, bercanggah. Diputuskan, berdasarkan kes *TR Sandah 1*, tuntutan NCR tidak berlanjut ke kawasan yang dirayau untuk mencari mata pencarian. Tambahan lagi, tiada keterangan bahawa tanah-tanah itu dibersihkan atau ditanam sebelum 1 Januari 1958 kerana tanah-tanah itu adalah hutan dara pada 1951 dan kekal sedemikian pada 1961. Hakim Mahkamah Tinggi juga mendapati bahawa responden, sebagai pemilik berdaftar, memegang hak milik tak boleh sangkal atas tanah-tanah itu yang hak miliknya tidak ditunjukkan dalam keterangan sebagai dikeluarkan secara fraud atau tanpa pematuhan pada proses sewajarnya. Mahkamah Rayuan sebulat suara mengesahkan dapatan-dapatan itu terutamanya berdasarkan pemakaian keputusan Mahkamah Rayuan dalam *TR Sandah 1* berkaitan *Pemakai Menoa* dan *Pulau Galau*; dan *TR Nyutan* berkaitan ketaksangkalan hak milik. Mahkamah Rayuan selanjutnya menyatakan bahawa pindaan pada Kanun Tanah dalam ss. 6A dan 28 tiada kesan pada kes tersebut kerana pindaan-pindaan tersebut berkuat kuasa hanya pada 1 Ogos 2019.

Soalan-soalan untuk penentuan adalah seperti berikut: (i) Kes A: sama ada betul daripada segi undang-undang atau wajar untuk Mahkamah Rayuan mengetepikan dapatan fakta hakim bicara bahawa plaintif-plaintif memperoleh dan/atau membentuk NCR individu atau kaum atas tanah Negeri di Sarawak atas pemakaian undang-undang keputusan *TR Sandah 1*; (ii) Kes B: walaupun amalan adat *Pemakai Menoa* dan *Pulau Galau* tidak wujud dalam undang-undang berkanun bawah Rajah, kewujudannya diakui dalam laporan-laporan dan teks sejarah, manakala tidak dapat disangkal bahawa hak-hak adat tidak diwujudkan oleh statut; sebaliknya, itu diakui sebagai sumber undang-undang tidak bertulis dan oleh itu, sama ada keputusan majoriti Mahkamah Persekutuan dalam *TR Sandah 1* berkaitan amalan adat *Pemakai Menoa* dan *Pulau Galau* wajar disemak, dan diakas, dan *Pemakai*

Menoa dan *Pulau Galau* dikembalikan sebagai amalan adat yang mempunyai kuat kuasa undang-undang; (iii) Kes C: (a) sama ada keputusan Mahkamah Rayuan dalam *Nor Nyawai* bahawa hak-hak orang asli terhad pada kawasan yang diduduki mereka dan bukan tempat mereka merayau untuk makanan adalah pernyataan undang-undang yang betul berkaitan dengan takat dan sifat hak-hak terhadap tanah yang dituntut bawah NCR di Sarawak; (b) sama ada amalan orang Iban yang dikatakan untuk mengekalkan kawasan hutan atau rimba sebagai '*Pulau*' untuk akses untuk makanan, hidupan liar dan hasil hutan, membangkitkan hak eksklusif terhadap tanah dalam '*Pulau*'; (c) sama ada pelaksanaan pemadaman NCR atas tanah seperti yang diperuntukkan bawah s. 15 KTS adalah diperlukan sebelum pemberian milik pajakan tanah Negeri; dan (d) jika jawapan untuk (c) dijawab secara positif, sama ada pajakan tanah Negeri diberi milik tanpa penamatan terdahulu NCR oleh itu tidak sah dan batal dan/atau kawasan-kawasan yang dibebani dengan NCR perlu dipotong atau dikecualikan daripada pajakan tanah Negeri; dan (iv) Kes D: sama ada Mahkamah Persekutuan wajar menyimpang daripada keputusan Mahkamah Persekutuan dalam *TR Sandah 1* atas soalan *Pemakai Menoa* dan *Pulau Galau* tiada kuat kuasa undang-undang dan *TR Nyutan* atas ketaksangkalan pajakan tanah Negeri dan jika demikian, sama ada kes-kes tersebut mempunyai apa-apa kesan penting terhadap keputusan Pesuruhjaya Kehakiman.

Diputuskan (menolak rayuan-rayuan dalam Kes A dan Kes D; mengembalikan Kes B dan Kes C masing-masing ke Mahkamah Rayuan dan Mahkamah Tinggi)

Oleh Abang Iskandar HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Pemakaian k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 mestilah dalam keadaan yang amat terkecuali. Walaupun perkataan yang digunakan adalah menyemak, mengakas, mengembalikan dan menyimpang, soalan-soalan itu mempunyai kesan, secara inti patinya, mempersoalkan ketepatan atau sebaliknya keputusan dalam *TR Sandah 1*, *TR Nyutan* dan *Nor Nyawai*. Keputusan yang menimbulkan kontroversi dalam *TR Sandah 1* adalah keputusan oleh Raus Sharif PMR (pada ketika itu) bahawa adat *Pemakai Menoa* dan *Pulau Galau* adalah adat tidak diakui oleh undang-undang Sarawak sebagai membentuk undang-undang adat anak Negeri Sarawak dan, oleh itu, itu adalah adat-adat yang tiada kuat kuasa undang-undang seperti yang dibayangkan bawah per. 160(2) Perlembagaan Persekutuan. Pandangan sedemikian mengesahkan keputusan Mahkamah Rayuan dalam *Nor Nyawai* bahawa hak-hak anak negeri terhad pada kawasan pendudukan mereka dan bukan tempat mereka merayau untuk makanan, sebagai pernyataan betul tentang undang-undang berkaitan takat hak pribumi terhadap tanah yang dituntut bawah NCR di Sarawak. Permohonan untuk semakan keputusan tersebut ditolak oleh Mahkamah Persekutuan ('*TR Sandah 2*')

(2) Faktor-faktor yang membolehkan mahkamah tertinggi menyimpang daripada keputusan terdahulunya adalah: (i) kewujudan keputusan berkonflik Mahkamah Persekutuan berkaitan perkara yang sama; dan (ii) keputusan dibuat *per incuriam*. Kedua-dua faktor tersebut tiada dalam kes ini. *TR Sandah 1* telah melalui sekurang-kurangnya tiga penelitian dalam *TR Sandah 2*, *Jeli Naga* dan *Binglai Buassan & Ors lwn. Entrep Resources Sdn Bhd & Ors* dan dalam kes-kes ini, pemutusan tentang *Pemakai Menoa* dan *Pulau Galau* tidak ditunjukkan telah dibuat *per incuriam*. Tiada juga keputusan Mahkamah Persekutuan terdahulu yang berkonflik secara langsung dengan *TR Sandah 1*. Oleh itu, tidak timbul keperluan untuk mengemukakan soalan sama ada *TR Sandah 1* perlu diteliti semula atau disemak.

(3) Pemutusan tentang *Pemakai Menoa* dan *Pulau Galau* adalah berdasarkan penilaian teliti undang-undang – bertulis dan tidak bertulis. Dan perbezaan, jika ada, antara hakim-hakim dalam *TR Sandah 1* adalah disebabkan tafsiran individu dan pentafsiran undang-undang bertulis berbanding undang-undang tidak bertulis – undang-undang adat. Oleh itu, tidak wajar untuk mahkamah ini mempertimbangkan sama ada atau tidak mereka mentafsir atau mengguna pakai undang-undang dengan betul, kerana itu adalah soal pendapat. Tambahan lagi, keputusan dalam *TR Sandah 1* telah ditangani melalui campur tangan legislatif dengan pindaan yang dibuat pada KTS dalam 2018.

(4) Salah satu objektif pindaan 2018 adalah mengiktiraf *Pemakai Menoa* dan *Pulau Galau* dalam skema KTS semasa, sebagai adat yang mempunyai kuat kuasa undang-undang dalam s. 6A – tetapi yang ditermakan sebagai 'Native Territorial Domain' ('NTD') untuk keterangkuman, yang terhadapnya hak milik adat pribumi untuk selama-lamanya diberikan dan dianggap sebagai hak milik yang diberi bawah SLC dan kepentingan proprietari dalam hak milik itu akan menjadi tidak boleh disangkal menurut s. 132 KTS. Aspek utama s. 6A, selain daripada pengiktirafan undang-undang bagi *Pemakai Menoa* dan *Pulau Galau* adalah pemberian hak milik adat pribumi untuk selama-lamanya, bebas daripada apa-apa premium, sewa atau lain-lain bayaran, atas nama perseorangan atau kumpulan orang yang memegang dalam amanah bagi pihak kaum pribumi yang dinamakan di dalamnya. Dan walaupun tuntutan tersebut terhad untuk setakat 500 hektar atau 1,000 hektar sewajarnya, hak NTD yang boleh dilaksanakan dalam rangkuman NTD boleh dituntut melebihi NCR bawah s. 5 KTS.

(5) Sub-seksyen 6 adalah peruntukan penting kerana itu meletakkan kepentingan pada tarikh kuat kuasa pindaan – 1 Ogos 2019, dan kemuktamadan keputusan mahkamah berkaitan tuntutan NTD. Malahan, amalan adat *Pemakai Menoa* dan *Pulau Galau* telah diberi pengiktirafan statutori, dengan kuat kuasa undang-undang, elemen

penting yang didapati tiada dalam keputusan Mahkamah Persekutuan dalam *TR Sandah 1* dan *TR Sandah 2* yang menafikan kuat kuasa amalan-amalan adat tersebut. Peruntukan ini menghalang tuntutan untuk NTD dibuat atau dibenarkan dalam mana-mana kawasan atau tanah yang diputuskan oleh mahkamah dengan bidang kuasa berkompeten sebelum 1 Ogos 2019. Keputusan akhir dalam peruntukan ini merujuk pada keputusan oleh mahkamah tertinggi – Mahkamah Persekutuan; dan bukan dengan perbicaraan Mahkamah Tinggi atau Mahkamah Rayuan, kerana apa-apa keputusan yang diperoleh di kedua-dua peringkat ini boleh dirayu lanjut menjadikan keputusan tersebut bukan 'keputusan terakhir' dalam maksud s. 6A(6). Oleh itu, pindaan 2018 mempunyai kesan membalikkan secara statutori keputusan *TR Sandah 1* berkaitan *Pemakai Menoa* dan *Pulau Galau* berkuat kuasa 1 Ogos 2019.

(6) Oleh itu: (i) soalan undang-undang dalam Kes A dijawab secara afirmatif. Apabila Mahkamah Rayuan mendengar dan memutuskan rayuan pada 13 Julai 2017, itu masih terikat daripada segi undang-undang dengan prinsip *stare decisis* untuk mengikuti keputusan Mahkamah Persekutuan yang dibuat pada 20 Disember 2016; (ii) soalan undang-undang dalam Kes B dijawab secara negative. *Pemakai Menoa* dan *Pulau Galau* adalah adat dengan kuat kuasa statutori dalam skema semasa hak milik pribumi dalam s. 6A KTS berbanding hak milik individu; (iii) soalan (a) dalam Kes C dijawab secara afirmatif. Tiada alasan sah untuk menyemak atau menilai semula sama ada keputusan Mahkamah Rayuan adalah betul atau sebaliknya, khususnya apabila perkara ini telah diputuskan oleh pindaan 2018 terhadap KTS; dan (b) soalan (b) dalam Kes C dijawab secara negatif; dan (iv) bahagian pertama Kes D dijawab secara negatif. Selanjutnya tiada alasan untuk menyemak atau menilai semula kes *TR Sandah 1* dan *TR Nyutan* dan oleh itu, penggunaan keputusan-keputusan ini oleh mahkamah di bawah, dalam keputusan-keputusan mereka yang dibuat sebelum tarikh kuat kuasa pindaan 2018 terhadap KTS, adalah betul dan wajar kerana keputusan-keputusan itu adalah undang-undang yang masih baik sehingga campur tangan legislatif.

(7) Soalan-soalan (c) dan (d) dalam Kes C dan sebahagian soalan dalam Kes D adalah berkaitan dengan ketaksangkalan hak milik dan pemadaman NCR dalam rayuan-rayuan ini. Dalam *TR Nyutan*, Mahkamah Persekutuan memutuskan bahawa kecuali terdapat bukti fraud, 's. 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it could be shown that NCR had been created over land in the manner prescribed under the same Code. A claim for NCR does not defeat the indefeasibility of title of land, even though the interest stated in the issue document of title was issued after NCR was asserted.' Mahkamah Persekutuan selanjutnya memutuskan bahawa 'the proper remedy for the infringement of NCR

as a result of the issuance of title or alienation of NCR, where such rights subsist without extinguishment thereof, is an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties.'

(8) Perkataan-perkataan dalam frasa 'subject to' adalah satu faktor yang perlu dipertimbangkan dalam mentafsir apa-apa statut. Perbezaan yang wujud dalam mentafsir maksud perkataan 'subject to' menunjukkan bahawa mentafsir perkataan itu bukan tanpa kesukaran walaupun kelihatan kesingkatan tidak berbahaya, seperti yang dinyatakan hanya dalam frasa dua perkataan. Dalam satu bahagian, itu dianggap sebagai menetapkan syarat, mengehadkan atau memberi syarat untuk penggunaan peruntukan dan di satu bahagian lagi, itu dianggap sebagai hanya menghubungkan satu peruntukan dengan satu lagi yang perlu dibaca dan diguna pakai, jika dan apabila relevan, tanpa menjadikan peruntukan itu mengatasi satu sama lain.

(9) Perkataan-perkataan 'subject to this Code' bukan hanya digunakan dalam s. 132(1) malahan di tempat lain dalam KTS. Memberi perkataan sama maksud yang sama di sepanjang statut adalah prinsip asas pentafsiran statut. Oleh itu, apabila perkataan atau ekspresi sama timbul lebih dari sekali dalam statut, itu perlu diberi maksud sama kecuali konteks itu mencadangkan sebaliknya, atau niat bertentangan secara penting atau tanpa boleh dihalang, wujud. Dalam konteks kes ini, frasa yang digunakan dalam permulaan s. 132 KTS adalah 'subject to this Code'. Kanun merujuk pada KTS secara keseluruhan dan KTS berkait bukan hanya dengan NCR malahan perkara-perkara berbeza, antara lain, pemberian milik, pendaftaran, peruntukan prosedur, peruntukan memberi kuasa, hak, liabiliti, kesalahan dan peruntukan penyelesaian pertikaian.

(10) Satu pentafsiran peruntukan statutori yang menjurus pada keputusan yang tidak boleh diramal atau tidak jelas, wajar dielak. Tanpa peruntukan langsung yang jelas untuk itu, NCR tidak, dalam skema KTS menjadi faktor syarat untuk ketaksangkalan hak milik. Seperti sedia ada, fraud adalah satu-satunya faktor, jika diplidkan dan dibuktikan oleh pihak yang menyatakannya, yang boleh menjadikan hak milik berdaftar boleh disangkal. Mahkamah tertinggi memutuskan sedemikian dalam kes *TR Nyutan* bahawa remedi terbuka untuk pihak yang terkilan adalah untuk ganti rugi secara pampasan bawah s. 197 KTS. Pindaan 2018 memperkenalkan konsep hak milik tak boleh sangkal tertangguh untuk pajakan sementara – dan bukan pajakan sebenar – sebagai balasan legislatif terhadap isu kontroversi ketaksangkalan hak milik dan soalan pemadaman NCR akibat daripada keputusan Mahkamah Persekutuan dalam *TR Nyutan*.

(11) Pindaan 2018 menghalang pemberian milik tanah Negeri sebelum penyelesaian tinjauan, yang akan membenarkan pengecualian NCR bawah s. 5 atau NTD bawah s. 6A daripada kawasan yang dirangkumi oleh pajakan sementara dan penafian pendaftaran pajakan sebenar jika kawasan itu telah dipegang bawah NCR atau NTD masing-masing. Akibatnya, sesiapa yang memegang pajakan sementara tidak berhak pada ketaksangkalan hak milik bawah s. 132 KTS. Kanun Tanah Sarawak jelas melindungi NCR apabila pemberian milik tanah Negeri atau kegunaan untuk tujuan awam dilarang untuk tanah yang mempunyai NCR yang dibentuk sah bawah s. 5 atau tanah yang telah diberi hak milik adat pribumi bawah s. 6A sehingga dan kecuali kesemua NCR diserahkan kembali atau dipadamkan atau peruntukan untuk memberi pampasan kepada orang yang berhak telah dibuat. Soalan tentang sama ada pelaksanaan pemadaman NCR atas tanah seperti yang diperuntukkan bawah s. 15 KTS adalah perlu sebelum pemberian milik pajakan tanah Negeri, dijawab secara afirmatif.

(12) Walau bagaimanapun, tiada peruntukan bawah s. 15 KTS dalam aspek sama ada pajakan tanah Negeri yang diberi milik tanpa pemadaman terdahulu NCR adalah batal dan tidak sah dan/atau kawasan yang dibebani NCR perlu dipotong atau dikecualikan daripada pajakan tanah Negeri. Adalah penting untuk melihat keseluruhan KTS berkaitan isu-isu pemadaman, ketaksangkalan hak milik dan NCR untuk memahami hubungannya dengan skema Kanun Tanah keseluruhannya, mempertimbangkan pindaan 2018 yang memberi kuasa untuk pengecualian NCR bawah s. 5 atau NTD bawah s. 6A dalam pajakan sementera sebelum pendaftaran menjadi pajakan penuh. Selanjutnya, mana-mana pribumi yang dinafikan NCRnya atas alasan pemberian milik boleh mendapatkan remedi dalam s. 197 KTS. Mengambil kira campur tangan legislatif untuk membetulkan kesan *TR Nyutan*, soalan yang dirangka berkaitan 'sama ada Mahkamah Persekutuan wajar menyimpang daripada keputusan *TR Nyutan*' mesti dijawab secara negatif.

(13) Perubahan legislatif dalam statut tidak diniatkan untuk mempunyai kesan retrospektif 'kecuali niat bertentangan ditunjukkan dalam terma jelas dan tanpa ragu-ragu atau dalam Bahasa sedemikian yang jelas memerlukan pentafsiran sedemikian …'. Walau bagaimanapun, terdapat perbezaan ketara antara kesan keputusan penghakiman dan statut berkaitan retrospektiviti dan prospektiviti. Wujud had dalam retrospektiviti keputusan penghakiman. Apa-apa keputusan yang dibuat, tanpa keperluan keputusan prospektif, boleh diguna pakai hanya untuk kes-kes yang tertunggak tidak kira sama ada di peringkat permulaan atau peringkat rayuan. Ini tentu tidak terpakai untuk kes-kes yang telah dilupuskan di peringkat rayuan tertinggi. Mahkamah terikat untuk mengguna pakai peruntukan semasa undang-undang

statutori – KTS – bukan hanya untuk kes-kes yang belum difailkan di mahkamah, malahan, terhadap 'kesemua kes-kes tertunggak dan kesemua kes yang masih dalam rayuan dalam sistem mahkamah kita'.

(14) Setakat 1 Ogos 2019, s. 6A KTS menjadi peruntukan yang menakluk NTD – atau apa yang umumnya dirujuk sebagai *Pemakai Menoa* dan *Pulau Galau* untuk masyarakat Iban; dan dari tarikh sama, keputusan dalam *TR Sandah 1* bahawa *Pemakai Menoa* dan *Pulau Galau* tiada kuat kuasa undang-undang, bukan lagi autoriti sah; dan mahkamah terikat untuk memberi kesan terhadap undang-undang statutori, seperti yang terkandung bawah s. 6A. Mempertimbangkan rayuan-rayuan ini dimulakan bawah s. 5 KTS dan diteruskan lanjut apabila pindaan-pindaan telah pun berkuat kuasa, memandangkan hal keadaan istimewa rayuan-rayuan ini, s. 6A KTS, khususnya sub-s. 6, mesti diguna pakai. Keputusan Mahkamah Rayuan bukan muktamad.

(15) Oleh itu, diputuskan: (i) Kes A: mempertimbangkan sifat adat *Pemakai Menoa* dan *Pulau Galau* dalam s. 6A, satu tuntutan individu, berbanding tuntutan kaum, tidak boleh dikekalkan. Rayuan berkaitan Kes A wajar dan adalah ditolak; (ii) Kes B: dengan permulaan kuat kuasa s. 6A, rayuan ini wajar dikembalikan ke Mahkamah Rayuan untuk dapatan fakta khususnya berkaitan kawasan di mana *Pemakai Menoa* dan *Pulau Galau* terletak dalam rangkuman 8,001 hektar tersebut mempertimbangkan maksimum 500 hektar atau 1,000 hektar *Pemakai Menoa* dan *Pulau Galau* sewajarnya seperti yang dibenarkan bawah s. 6A. Apa-apa dapatan sedemikian akan menjadi relevan untuk tujuan pampasan bawah s. 197 KTS untuk perayu-perayu yang mungkin dinafikan hak mereka atas alasan pemberian milik tanah-tanah kepada pihak ketiga; (iii) Kes C: pelupusan terus tuntutan perayu-perayu terhadap pihak ketiga tidak wajar hanya berdasarkan keterangan afidavit. Keterangan perlu dimasukkan secara *viva voce* tertakluk pada pemeriksaan balas oleh pihak lawan. Dan atas alasan ini, kes ini dikembalikan ke Mahkamah Tinggi untuk dibicarakan sepenuhnya antara perayu-perayu dan pihak ketiga khususnya atas persoalan sama ada terdapat NCR dibentuk atau wujud atas tanah yang diberi milik yang memberi hak pada perayu-perayu untuk pampasan; dan (iv) Kes D: Atas penilaian kedua-dua penghakiman Mahkamah Tinggi dan Mahkamah Rayuan, mahkamah berpuas hati bahawa dapatan serentak adalah bahawa tiada NCR terbentuk atau wujud atas tanah yang berkaitan. Tiada sebab untuk mengganggu dapatan sedemikian oleh kedua-dua mahkamah di bawah. Keputusan Mahkamah Tinggi dan Mahkamah Rayuan disahkan, dan rayuan ini, oleh itu, ditolak.

Case(s) referred to:

AG v. Prince Ernest Augustus of Hanover [1957] AC 436 ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***
B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC ***(refd)***
Bowtell v. Goldsbrough, Mort And Company Ltd [1905] 3 CLR 444 ***(refd)***
Cadder v. Her Majesty's Advocate [2010] UKSC 43 ***(refd)***
CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 6 CLJ 471 FC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2021] 6 CLJ 1 FC ***(refd)***
Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 FC ***(refd)***
Golden Star & Ors v. Ling Peek Hoe & Ors [2021] 3 CLJ 443 FC ***(refd)***
Government Of The Federation Of Malaya v. Surinder Singh Kanda [1960] 1 LNS 30 HC ***(refd)***
Heydon's Case (1504) 76 ER 637 ***(refd)***
Husli Mok v. Superintendent Of Lands & Surveys & Anor [2014] 9 CLJ 733 FC ***(refd)***
Indira Nehru Gandhi v. Shri Raj Narain [1975] 2 SCC 159 ***(refd)***
Inland Revenue Commissioners v. Hinchy [1960] 1 All ER 505 ***(refd)***
Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals [2020] 1 CLJ 193 FC ***(refd)***
Jeli Anak Naga & Ors v. Tung Huat Pelita Niah Plantation Sdn Bhd & Ors [2020] 1 CLJ 449 FC ***(refd)***
Khoo Hi Chiang v. PP And Another Case [1994] 2 CLJ 151 SC ***(refd)***
Kleinwort Benson Ltd v. Lincoln City Council [1998] 3 WLR 1095 ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal [2017] 7 CLJ 641 FC ***(refd)***
Mabo And Others v. Queensland (No. 2) [1992] HCA 23 ***(refd)***
Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 4 CLJ 12 FC ***(refd)***
Maxwell v. Murphy [1957] 96 CLR 261 ***(refd)***
Medical Council of India v. State of Kerala (Writ Petition (C) No 178 & 231 of 2018) ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Nikodemus & Ors v. Superintendent of Lands and Surveys Samarahan Division & Ors (Civil Appeal No. 01 (f)-32-10-2019 (Q) (Unreported) ***(refd)***
Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Richard Kwan [1970] 1 LNS 117 HC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
R v. Zeolkowski [1989] 1 SCR 1378 ***(refd)***
Ramanathan Yogendran v. PP [1995] 2 SLR 563 ***(refd)***
Ramba Bungkong & Ors v. Unus Tambi & Ors (Civil Appeal No. 01(i)-33-10-2019 (Q)) (Unreported) ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Smith v. London Transport Executive [1951] AC 555 565 ***(refd)***
Spectrum Plus Ltd, Re; National Westminster Bank plc v. Spectrum Plus Ltd [2005] UKHL 41 ***(refd)***
ST Sadiq v. State Of Kerala [2015] 4 SCC 400 ***(refd)***
Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals [2018] 1 CLJ 19 FC ***(refd)***
TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications [2019] 10 CLJ 436 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Warburton v. Loveland d Ivie [1828] 1 Hud & B 623 ***(refd)***
Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications [2021] 1 CLJ 631 FC ***(refd)***

Legislation referred to:
Administration of Islamic Law (Federal Territories) Act 1993, s. 59(1)
Federal Constitution, arts. 140(1), 144(1), 160(2), 162
Land Code (Sarawak) (Cap 81) , ss. 2, 4(4), 5(2)(f), (3), 6A(6), 10, 13, 15, 18, 18A, 28, 29(1), 82, 132(1), 197
Rules of Court 2012, O. 14A, O. 18 r. 19
Rules of the Federal Court 1995, r. 137

Other source(s) referred to:
Maxwell, *Interpretation of Statutes*, 3rd edn, p 28
NS Bindra's Interpretation of Statutes, 9th edn, 2002, p 645
Sullivan on the Construction of Statutes, 6th edn, LexisNexis, 2014, p 405

(Case No: 01(f)-31-10-2019 (Q))
For the appellants - Mekanda Singh Sandhu, M Izayyeem Azim & Paul Raja; M/s Sagau, Raja & Co
For the respondents - Mohd Adzrul Adzlan & Anisa Fadhillah Mohamed Jamel; Sarawak State Attorney General's Chambers

(Case No: 02(f)-77-10-2019 (Q))
For the appellants - Mekanda Singh Sandhu, M Izayyeem Azim & Paul Raja; M/s Sagau, Raja & Co
For the respondents - Danny Huang Dung Po; M/s Huang & Co Advocs

(Case No: 01(f)-32-10-2019 (Q))
For the appellants - Dominique Ng Kim Ho & Berrylin Ng Phuay Lee; M/s Dominique Ng & Assocs
For the respondents - Mohd Adzrul Adzlan & Ronald Felix Hardin; Sarawak State Attorney General's Chambers

(Case No: 01(i)-33-10-2019 (Q))
For the appellants - Simon Siah, Clarice Chan & Joshua Baru; M/s Simon Siah Chua and Chow Advocs
For the respondents - Mohd Adzrul Adzian & Ronald Felix Hardin; Sarawak State Attorney General's Chambers

(Case No: 02(i)-79-10-2019 (Q))
For the appellants - Simon Siah, Clarice Chan & Joshua Baru; M/s Simon Siah, Chua and Chow Advocs
For the respondents - Gabriel CH Kok & Amanda Yong; M/s Khoo & Co Advocs

(Case No: 02(f)-76-10-2019 (Q))
For the appellants - Dominique Ng Kim Ho & Berrylin Ng Phuay Lee; M/s Dominique Ng & Assocs
For the respondents - Tony Lim Lee Tom & Nathan Ting; M/s Satem, Chai & Dominic Lai Advocs

[Editor's note: For the Court of Appeal judgment, please see Government Of Sarawak & Anor v. Busing Anak Jali & Ors And Another Appeal [2019] 4 CLJ 179 (affirmed); For the High Court judgment, please see [2014] 1 LNS 623 (affirmed).]

Reported by S Barathi

JUDGMENT

Abang Iskandar CJ (Sabah & Sarawak):

Introduction

[1] There are six appeals that were heard together despite there being different parties involved, except in two cases – case A and case C (which will be enumerated later) where the parties are the same. We heard oral submissions by all learned counsels representing the respective parties on two separate dates. At the end of those submissions, we stood down for the panel members to deliberate. Unfortunately, we were not able to come up with a decision on that day. We therefore indicated to all learned counsels that we needed a bit of time to consider the respective submissions and that they would be informed once a decision is reached pertaining to each of these appeals, in due course. We have now reached our decisions and what follows below are our deliberations of the issues raised and our reasons as to why we have so decided.

[2] My learned brothers Justices Vernon Ong Lam Kiat and Harmindar Singh Dhaliwal and my learned sisters Justice Zabariah Mohd Yusof and Justice Hasnah Mohammed Hashim had read this judgment in draft and they had indicated to me their agreement with it and that it becomes the judgment of this court.

[3] Although there have been not a few issues raised in the questions that were posed before this court for our considerations, we observed that there were some common issues that transcended most of the appeals. The main commonality in these cases has been the very subject matter of the dispute – the native customary right ("NCR") in Sarawak; and the questions of law for this court's determination – on matters relating to the Federal Court decisions in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1 ("*TR Sandah 1*"); *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* [2018] 1 CLJ 19; [2018] 1

MLJ 77 ("*TR Nyutan*"); and the Court of Appeal decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555 ("*Nor Ak Nyawai*") *vis-à-vis* the 2018 amendments to the Sarawak Land Code ("SLC").

[4] For clarity and better understanding of the issues in question, it is pertinent for us to provide a brief history of the facts of each case which finally culminated in the framing of the questions for the court's determination.

Brief Background Of The Cases

Case A

Case No	Appellant	Respondent
01(f)-31-10/2019 (Q)	1. Busing Anak Jali 2. Lai Ak Jali 3. Nanggai Ak Liyom 4. Burai Anak Enseriban 5. Bunyie Ak Guha 6. Bunta Ak Mamut 7. Marsar Ak Aping	1. Kerajaan Negeri Sarawak 2. Jabatan Tanah dan Survei Cawangan Mukah
02(f)-77-10/2019 (Q)	1. Busing Anak Jali 2. Lai Ak Jali 3. Nanggai Ak Liyom 4. Burai Anak Enseriban 5. Bunyie Ak Guha 6. Bunta Ak Mamut 7. Marsar Ak Aping	Empire Plantation Sdn Bhd

[5] The question of law for this court's determination is framed in the following manner:

> **Whether it is correct in law or proper for the Court of Appeal to set aside the trial judge's finding of fact** that the Plaintiffs have acquired and/or created individual or communal native customary rights over State land in Sarawak **on the application as a matter of law of the decision in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1.** (emphasis added)

[6] In this case, the High Court Judge had, on 3 February 2014, decided upon a full trial that the appellants had acquired and/or created individual or communal NCR over 1391.42 acres of land within the 4,460 hectares more or less of the provisional lease Lot 11 granted to Empire Plantation Sdn Bhd. In his judgment, the judge was satisfied, on the balance of probabilities that the appellants had proved the NCR of *Pemakai Menoa* and *Pulau Galau* over the said land. The aggrieved defendants appealed against that decision.

[7] On appeal, the Court of Appeal reversed the decision of the High Court Judge and ruled that based on the decision of *TR Sandah 1*, the customary practices of *Pemakai Menoa* and *Pulau Galau* were not customs or usages having the force of law in the Sarawak State laws as defined in art. 160(2) of the Federal Constitution.

[8] The Court of Appeal further stated that the customary practices of *Pemakai Menoa* and *Pulau Galau* must be for the whole community, and since the claim was not a representative action but was only for the seven appellants, it must necessarily fail. It was this aspect of the Court of Appeal's decision that the appellants sought this court's consideration to answer additional question as to "whether the claim for NCR based on *Pemakai Menoa* and *Pulau Galau* must be for the whole community and not for the appellants only" (the Court of Appeal's decision was made on 13 July 2017).

[9] Clearly, the question for this court's determination concerns the correctness of the Court of Appeal's application of the majority ruling in *TR Sandah 1* in respect of the customary practices of *Pemakai Menoa* and *Pulau Galau* to the finding of facts and the decision of the High Court Judge.

Case B

Case No	Appellant	Respondent
01(f)-32-10/2019 (Q)	1. Nikodemus Anak Singgai 2. Gubil Anak Padat 3. Sangat Ak Lasa (A representative action)	1. Superintendent of Lands and Surveys Samarahan Division 2. Director of Forest, Sarawak 3. Kerajaan Negeri Sarawak

[10] The question of law for the court's determination is as follows:

> Whilst the customary practices of *Pemakai Menoa* and *Pulau Galau* do not appear in any codified law under the Rajahs, their existence had been acknowledged in the Reports and historical texts, whereas it is axiomatic that customary rights do not owe their existence to statute; instead, they are recognised as a source of unwritten laws, and as such, *whether the majority decision of Federal Court in Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1 with respect to customary practices of Pemakai Menoa and Pulau should be reviewed, and overturned, and Pemakai Menoa and Pulau restored as customary practices having the force of law*.
>
> (emphasis added)

[11] This case is a representative action brought on behalf of the claimants and all others who claimed native customary rights over land at or around Kampung Spaoh, Kampung Menat Ulu and Kampung Menat Ili at Gedong in the district of Simunjan, Sarawak.

[12] In this case, there were initially six respondents including the three above, namely Sibu Slipway Sdn Bhd, the holder of Forest Licence No. 8393; Lambang Sinar Mas Sdn Bhd, the holder of two leases described

as Lot 226, Block 4, Sedilu-Gedong Land District and Lot 1, Block 9, Sedilu-Gedong Land District; and Indranika Jaya Sdn Bhd, the holder of a lease described as Lots 164, 162 and 173 of Sedilu-Gedong Land District.

[13] However, these three parties were removed from the suit by virtue of their successful striking out applications primarily due to their holding of the indefeasibility of title of the licence and the lease as demonstrated in *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 ("*Nikodemus 1*"). Hence, the full trial of the matter proceeded only against the Superintendent of Lands and Surveys Samarahan Division, Director of Forest, Sarawak and Kerajaan Negeri Sarawak.

[14] At the High Court, the judge found on 11 August 2014, on the strength of the evidence presented after a full trial, that the appellants had successfully proved, on the balance of probabilities, that they had acquired, created and/or inherited NCR prior to the 1 January 1958 over the disputed areas of 8,001 hectares over which the forest timber licence and leases were issued. Of the 8,001 hectares, were cultivation mosaics measuring approximately 300 hectares.

[15] However, in view of the earlier judgment in *Nikodemus 1* on indefeasibility of titles, the judge varied the earlier order and decided that an award of general damages to be assessed by the SAR against the respondents for loss of the appellants' native customary rights over the entire disputed areas which have been alienated to the named licensee and lessees above. This variation order was made on 10 September 2014.

[16] On appeal, the Court of Appeal decided on 13 July 2017 that the appellants are only entitled to the NCR over the 300 hectares of cultivation mosaics – the agreed *temuda*, but not to the entire areas of *Pemakai Menoa* and *Pulau Galau*, based on the decision of the Federal Court in *TR Sandah 1*.

Case C

Case No	Appellant	Respondent
01(i)-33-10/2019 (Q)	1. Ramba Ak Bungkong 2. Mujing Ak Ragai 3. Johnny Ak Louis Nanta 4. Jarin Ak Leng 5. Aning Ak Simon 6. Dickson Ak Jalang	1. Unus bin Tambi 2. Superintendent of Lands and Surveys, Miri Division 3. State Government of Sarawak
02(i)-79-10/2019 (Q)	1. Ramba Ak Bungkong 2. Mujing Ak Ragai 3. Johnny Ak Louis Nanta 4. Jarin Ak Leng 5. Aning Ak Simon 6. Dickson Ak Jalang	Asco Green Sdn Bhd

[17] At the High Court, Asco Green Sdn Bhd was the plaintiff, and the appellants were the defendants while Unus bin Tambi, Superintendent of Lands and Surveys, Miri Division and State Government of Sarawak were made third parties. Asco Green sued the appellants for a right to vacant possession; order of eviction; and declarations that the appellants were trespassers and illegal occupiers on the land it held on a lease.

[18] Asco Green then sought for a summary judgment under O. 14A of the Rules of Court 2012 ("ROC") as well as for striking out the appellants' defence and counterclaim under O. 18 r. 19 of the ROC. The third parties similarly filed for striking out of the appellants' statement of claim against them. These applications were allowed on 3 November 2017, hence the appellants' defence and counterclaim against Asco Green Sdn Bhd and their statement of claim against the third party were struck out.

[19] Judgment was also entered against the appellants under O. 14A of the ROC based on the following main reasons:

(i) That Asco Green Sdn Bhd, as the registered proprietor of an area approximately 707 hectares described as Lot 130, Block 3, Bakong Land District for the lease of the said land holds an indefeasible title.

(ii) Based on the affidavit evidence, the disputed area of Lot 130 was a primary forest in 1947 and 1963 with no proof of cultivation or settlement.

(iii) The claim of NCR over the area for foraging food, deriving valuable medicines, wildlife and other forest produce for livelihood and sustenance in the context of *Pemakai Menoa* and *Pulau Galau* are not maintainable because they are customs that have no force of law as ruled by the Federal Court in *TR Sandah 1*.

[20] The Court of Appeal upheld the decision of the High Court on 20 February 2019 and ruled that the disposal of the matter summarily under O. 14A; and O. 18 r. 19 of the ROC against the appellants was proper on the facts and circumstances of the case.

[21] The question of indefeasibility of title held by Asco Green was a non-issue, on top of the absence of any allegation of fraud in the pleading either against Asco Green or the third parties. Hence the absence of any vitiating factor defeating Asco Green's right as the registered proprietor of Lot 130.

[22] The Court of Appeal also held that the legal status of *Pemakai Menoa* and *Pulau Galau* have been firmly established by the Federal Court in *TR Sandah 1* as having no force of law, that they cannot be grounds for claims of NCR. As a corollary, the question of extinguishment of NCR land did not arise.

[23] Following the decision of the Court of Appeal, four questions of law were framed by the appellants for this court's determination, as follows:

(i) Whether the Court of Appeal's decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555 that the rights of the natives are confined to the area where they settled and not where they foraged for food is a correct statement of law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak.

(ii) Whether the alleged practice of the Iban to preserve an area of jungle or forests as "*Pulau*" for access for food, wildlife and forest produce, gives rise to exclusive rights to the land in the "*Pulau*".

(iii) Whether an extinguishment exercise of native customary rights over land as provided under s. 15 of the Sarawak Land Code (Sarawak) (Cap 81) is required prior to the alienation of lease of State land;

(iv) If the answer to (iii) is in the positive, whether the lease of State land alienated without prior extinguishment of native customary rights is therefore null and void and/or the areas encumbered with native customary rights to be excised out or excluded from the lease of State land.

Case D

Case No	Appellant	Respondent
02(f)-76-10/2019	1. Yahya bin Timbon 2. Mahari bin Lamat 3. Haslan bin Abu Bakar	Kumpulan Parabena Sdn Bhd

[24] At the High Court, the respondent initially filed separate originating summonses ("OS") against each appellant for, *inter alia*, vacant possession and quiet enjoyment of the lands described as Lot 187 and Lot 188 of Block 10, Lambir Land District which are held on lease for a term of 60 years from 1 September 2009. The said OS were converted to writ actions and jointly tried.

[25] Upon evaluating the evidence, the High Court Judge had, on 17 January 2018, allowed the respondent's claim and dismissed the appellants' counterclaim of NCR over the disputed areas, primarily due to the unsatisfactory and to a certain extent, contradictory evidence.

[26] It was held that in light of the Federal Court's decision in *TR Sandah 1*, NCR claim does not extend to areas where the natives used to roam to forage for their livelihood. Moreover, there was no evidence of the said lands being cleared or cultivated before 1 January 1958 for the said lands were a virgin forest in 1951 and remained the same in 1961.

[27] The High Court Judge also found that the respondent, as the registered proprietor held indefeasible title over the disputed lands which title was not shown on evidence to have been issued fraudulently or without complying to due processes.

[28] On appeal, the Court of Appeal unanimously confirmed the findings and the decision of the High Court Judge on 8 January 2019 mainly based on the application of the Federal Court's decision in *TR Sandah 1* on *Pemakai Menoa* and *Pulau Galau*; and *TR Nyutan* on indefeasibility of title. The Court of Appeal further noted that amendments to the Land Code in ss. 6A and 28 have no bearing on the case as the amendments took effect only on 1 August 2019.

[29] Stemming from the Court of Appeal decision, the following question of law was framed for the Federal Court's determination:

> **Whether the Federal Court should depart from the decision of the Federal Court in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals [2017] 3 CLJ 1*** on the question of *Pemakai Menoa* and *Pulau Galau* having no force of law **and that of *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* [2018] 1 CLJ 19; [2018] 1 MLJ 77** on the indefeasibility of the Lease of State Land and if so, **whether those cases have any significant bearing on the decision of the learned Judicial Commissioner in any event?**
>
> (emphasis added)

The Commonality Of The Questions Of Law

[30] Upon analysing the various questions framed for this court's determination, we identified the commonalities of those questions which we would categorise into three main issues and sub-issues as follows:

(i) Reviewing or revisiting earlier decision/s of the Federal Court in *TR Sandah 1* (cases B, D) and *TR Nyutan* (case D) and of the Court of Appeal in *Nor Ak Nyawai* (case C):

  (a) The correctness of applying *TR Sandah 1* to the trial judge's finding of facts on NCR (case A).

  (b) Communal versus individual NCR (added question in case A).

(ii) *TR Nyutan* – on indefeasibility of title and extinguishment of NCR (cases C, D).

(iii) The effects of the 2018 amendments to the Sarawak Land Code.

Reviewing Or Revisiting Earlier Decisions

[31] There are two modes where this court may assess and examine earlier decisions – through a proper review application under r. 137 of the Rules of the Federal Court 1995, or by way of an appeal proper.

[32] The application of r. 137 has been succinctly explained by this court in *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 ("*Asean Security*") that was followed subsequently by this court in a number of recent cases such as *Golden Star & Ors v. Ling Peek Hoe & Ors* [2021] 3 CLJ 443; *Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd & Anor And Other Applications* [2021] 1 CLJ 631; *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2021] 6 CLJ 1, to name a few. In gist, there must be very exceptional circumstance for a review to take place. But we are not concerned with this type of application in this case.

[33] In the present case, three earlier decisions are sought to be revisited – two are the Federal Court decisions – *TR Sandah 1* and *TR Nyutan*; and one Court of Appeal decision – *Nor Ak Nyawai*. At the risk of repetition, we find the need to reproduce the three related questions posed to us which are framed in the following manner:

> ... whether the majority decision of Federal Court in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1 with respect to customary practices of *Pemakai Menoa* and *Pulau* **should be reviewed, and overturned**, and *Pemakai Menoa* and *Pulau* be restored as customary practices having the force of law. (Case B)
>
> Whether the Court of Appeal's decision in *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555 that the rights of the natives are confined to the area where they settled and not where they foraged for food **is a correct statement of law**. (Case C)
>
> Whether the Federal Court **should depart** from the decision of the Federal Court in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1 on the question of *Pemakai Menoa* and *Pulau Galau* having no force of law and that of *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* [2018] 1 CLJ 19; [2018] 1 MLJ 77 on the indefeasibility of the lease of State Land and if so, whether those cases have any significant bearing on the decision of the Learned Judicial Commissioner in any event. (Case D)
>
> (emphasis added)

[34] It was on the basis of the manner as to how the questions of law framed for this court's determination, that the respondents urged this court to dismiss the appeals, because these questions sought to review the substantive merits of the Federal Court decision in *TR Sandah 1*, which should be initiated by a proper review application under r. 137 of the Rules of the Federal Court 1995.

[35] In all fairness, there is merit in this argument by the respondents, in that although the words used are review, overturn, restore and depart, these questions have the effect, in pith and substance, of questioning the correctness or otherwise of those very decisions in *TR Sandah 1*, *TR Nyutan* and *Nor Ak Nyawai*.

[36] In fact, we found that the question framed in this case in respect of the correctness of the Court of Appeal's statement in *Nor Ak Nyawai* to be exactly similar as question 3 posed to the Federal Court in *TR Sandah 1* and questions 1 and 2 in *Jeli Anak Naga & Ors v. Tung Huat Pelita Niah Plantation Sdn Bhd & Ors* [2020] 1 CLJ 449; [2019] MLJU 1311 ("*Jeli Anak Naga*") as follows:

TR Sandah 1

(c) **Whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555; [2006] 1 MLJ 256** that the rights of the natives is confined to the area where they settled and not where they foraged for food is a **correct statement of the law** relating to the extent and nature of rights to land claimed under native customary rights in Sarawak. (Question 3)

Jeli Anak Naga

1. **Whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555; [2006] 1 MLJ 256** that the rights of the natives is confined to the area where they settled and not where they foraged for food **is a correct statement of the law** relating to the extent and nature of rights to land claimed under native customary rights in Sarawak. [Question 1]

2. Whether the alleged practice of the Iban to preserve an area of jungle or forests as "*Pulau*" for access for food, wildlife and forest produce, give rise to exclusive rights to the land in the "*Pulau*"? [Question 2]

[37] Clearly, it could not escape our observation that the questions posed to us which related to the Court of Appeal's statement's in *Nor Ak Nyawai* are another attempt of re-litigating similar questions of law which this court had, with respect, already answered in *TR Sandah 1* and in *Jeli Anak Naga*.

[38] Having said that however, these six appeals are coming up from the decisions of the Court of Appeal, revolving around issues of the application of *TR Sandah 1*, *TR Nyutan*, and *Nor Ak Nyawai* which directly relate to the 2018 amendments of the Sarawak Land Code.

[39] For these reasons, we think it is improper to simply dismiss the appeals on the basis of procedural impropriety as submitted by the respondents. These appeals come within what Abdul Hamid Mohamad CJ stated in *Asean Security* as an attempt to revisit earlier decisions:

> If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting".

What Does *TR Sandah 1* Decide?

[40] The main controversial decision of the majority of 3:1 in *TR Sandah 1* is the ruling by Md Raus Sharif PCA (as he then was), agreed to by Ahmad Maarop FCJ (as he then was) that the customs of *Pemakai Menoa* and *Pulau*

Galau are customs that the laws of Sarawak do not recognise as forming part of the customary laws of the natives of Sarawak and as such, they are customs which have no force of law as envisaged under art. 160(2) of the Federal Constitution.

[41] Such view effectively affirmed what the Court of Appeal held in *Nor Ak Nyawai* that the rights of the natives are confined to the area where they settled and not where they foraged for food, as a correct statement of the law relating to the extent of natives' rights to land claimed under native customary rights in Sarawak.

[42] Following the decision in *TR Sandah 1*, an application for review under r. 137 of the Rules of the Federal Court 1995 was filed and heard. By a majority of 4:1, the Federal Court dismissed the review application. This is reported in *TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications* [2019] 10 CLJ 436; [2019] 6 MLJ 141 ("*TR Sandah 2*").

[43] We had occasion to peruse the decisions in both *TR Sandah 1* and *TR Sandah 2* and found that the approach taken in questioning the decision of the majority in *TR Sandah 1* is similar to what was raised in *TR Sandah 2* and the present appeals. In fact, similar argument was also taken up and raised in the Federal Court case of *Jeli Anak Naga*.

[44] We hereby summarise the gist of the parties' submissions on this issue.

The Parties' Submissions

Errors In TR Sandah 1

[45] The appellants submitted that the majority in *TR Sandah 1* fell into a serious error when ruling that *Pemakai Menoa* and *Pulau Galau* as having no force of law, based on the following reasons:

(i) Failure to consider the recognition of English common law on custom as part of the laws of Sarawak in Rajah's Order No. L-4 1928; and the notes for the guidance of officers in interpreting Order No. L-4,1928. The customs of *Pemakai Menoa* and *Pulau Galau* satisfy the tests and the essential elements of a custom in the above laws and are therefore legally enforceable rights.

(ii) The nature of the native customary law as being unwritten and *sui generis*, flexible and adaptable to the needs of the community. They do not owe their existence to statute. Rather, the binding effect of the customs comes from the custom being generally accepted and having the assent of the native community. Acknowledgment of only codified customs in statute, which become positive law, undermines the position of the native custom or native customary law as "existing law" under art. 162 of the Federal Constitution.

(iii) The failure to recognise the method of establishing customary right to land by way of "any other lawful method" in s. 5(2)(f) of the Sarawak Land Code.

[46] On points (i) and (ii) above, the respondents argued before us that the appellants' line of arguments above have been dealt with and ventilated *in extenso* by the Federal Court in *TR Sandah 1*.

[47] It was further contended on behalf of the respondents that the Rajah's Order No. L-4 1928; and the notes for the guidance of officers in interpreting Order No. L-4, 1928 are applicable only in respect of certain branches of law which are silent or where laws are yet to be enacted for. Hence, they do not cover land matters because they are already governed by various existing laws such as the Rajah's Order 1875; the Fruit Trees Order 1899; the Land Order 1920; the Land Settlement Ordinance 1933; Secretariat Circular 1939; *Tusun Tunggu*; and s. 5 of the Land Code. As such, the customary practice of *Temuda* or clearing of virgin forest for cultivation and the principle of continuous occupation are the only recognised and enforceable NCR. In other words, the omissions in relation to *Pemakai Menoa* and *Pulau Galau* must have been deliberate.

[48] The respondents further submitted that the decision of the majority in *TR Sandah 1* stands as good law and was followed by subsequent Federal Court decisions in *Jeli Anak Naga* and *Binglai Anak Buassan & Ors v. Entrep Resources Sdn Bhd & Ors* (Unreported). The dismissal of the review application in *TR Sandah 2* further strengthens the case that there is no justifiable reason for departing from the ruling in *TR Sandah 1* in respect of the customs of *Pemakai Menoa* and *Pulau Galau*.

[49] Regarding point (iii), the respondents argued that it was not possible for the Federal Court to consider "any other lawful method" under para. (f) as the customs claimed must firstly be proved to be lawful within the meaning of art. 160(2) of the Federal Constitution. Therefore, although the practices of *Pemakai Menoa* or *Pulau Galau* exist as Iban customs, they are nevertheless not legally enforceable.

The Ruling On *Pemakai Menoa* And *Pulau Galau* - 3:1 Or 2:2? Legal Reasoning Versus Decision

[50] The appellants submitted that it is the legal reasoning and not the decision that binds the courts below in the application of the principle of *stare decisis*. Hence, *stare decisis* was argued to be operative only when there is conclusive legal precedent.

[51] In this respect, the appellants argued that revisiting *TR Sandah 1* is necessary for want of clarity on the legal position because a close scrutiny of the ruling on *Pemakai Menoa* and *Pulau Galau* reveals that there was, in actual fact, a split of 2:2 and not 3:1. This is because, Abu Samah Nordin FCJ who formed part of the majority viewed that *Pemakai Menoa* and *Pulau*

Galau are legally recognised customs – consistent with the dissenting view of Zainun Ali FCJ – but which must be proved on evidence, which in his view, the appellants had failed to do.

[52] Therefore, the appellants urged that this court would, in fact be obliged to look at the reasoning rather than the decision in *TR Sandah 1* on *Pemakai Menoa* and *Pulau Galau*. The appellants argued that since there is no majority decision on the principle of law relating to *Pemakai Menoa* and *Pulau Galau*, there is no obligation by the courts below, by way of *stare decisis*, to apply the decision of *TR Sandah 1*, and so, this court is at liberty to differ from what Md Raus Sharif PCA and Ahmad Maarop FCJ held on *Pemakai Menoa* and *Pulau Galau*.

[53] The respondents on the other hand contended that this line of argument has been raised in *TR Sandah 2*, *Jeli Anak Naga* and *Binglai Anak Buassan* and the Federal Court has consistently confirmed that the decision in *TR Sandah 1* is a decision of the majority of 3:1 and not 2:2.

[54] The respondents further argued that departing from *TR Sandah 1* would mean departing from all other decisions of the Federal Court adopting and confirming the said decision, which effectively will result in further uncertainties and chaos, considering the statutory intervention by the 2018 amendments to the Sarawak Land Code.

Judicial Precedent In The Apex Court – When To Depart From Earlier Decision?

[55] At the outset, we are fully aware of the facts that these lines of submissions challenging/defending *TR Sandah 1* were raised, presented and argued in *TR Sandah 2*, *Jeli Anak Naga* and *Binglai Anak Buassan* and the Federal Court had, in these cases found no reasons to depart from its earlier decision in *TR Sandah 1*.

[56] Faced with similar application of reviewing or revisiting this court's earlier decisions, we think it is proper to first lay down the legal principles governing the exercise of power to revisit earlier decisions in the context of the rule of judicial precedent in the apex court.

[57] The case of *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1 ("*Dalip Bhagwan*") provides guidance as to what factors to consider when dealing with the question of judicial precedent and its exceptions. The first factor where this court may depart from earlier decision is the existence of conflicting decisions of the Federal Court over the same subject matter. The other factor is decision made *per incuriam* – which correction of error is normally dependent on legislative process. It was held that:

> The rule of judicial precedent in relation to the House of Lords was stated in *London Tramways v. London County Council* [1898] AC 375 that it was bound by its own previous decision in the interests of *finality and certainty*

of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.

However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the 'Practice Statement (Judicial Precedent) 1966' which is set out below:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of **certainty** upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, **to depart from a previous decision when it appears right to do so**.
>
> (emphasis added)

[58] Our judicial history shows that this court had previously undertaken such exercise of overruling or departing from earlier decisions in the context of the standard of proof at the end of prosecution's case. We see how the law had developed where the ruling of the Supreme Court in this respect in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 was overruled by the Supreme Court in *Khoo Hi Chiang v. PP And Another Case* [1994] 2 CLJ 151; [1994] 1 MLJ 265 which subsequently was partly overruled by the Federal Court in *Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514. *Tan Boon Kean* was in turn overruled by the majority judgment of the Federal Court in *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1. The "beyond reasonable doubt standard" by the majority of 4:3 in *Arulpragasan* (*supra*) led to the amendment to the Criminal Procedure Code in 1997 *via* Act A979 which took effect on 31 January 1997, which saw the articulation of the *prima facie* proof that the prosecution is obligated to establish before the accused person is legally obliged to enter on his or her defence.

[59] So, we see how the Federal Court in *Dalip Bhagwan* case guides us in dealing with the questions of the application of judicial ruling for the courts below by way of *stare decisis* and the impact of a legislative action in the following manner:

> When leave was granted in February 1991 to refer Question 2 posed to us and as set out above, and for that matter, when the High Court heard the appeal in 1990 from the decision of the Sessions Court in question, *the legal position of the burden of proof at the close of the prosecution's case was still governed by the test of prima facie case as in Munusamy's case*, so in answering the question cast in the past tense to indicate 1990, it should be borne in mind that the position of law referred to was as in 1990.

A The answer to Question 2 therefore is in the affirmative.

In this connection, if Question 2 had not been framed in the past tense so as to require an answer applicable in 1990 about the burden of proof at the close of the prosecution's case, *but if it were cast in the present tense instead, then it is piquant that the Sessions Court would have been right in so* B *assessing the reliability, etc of prosecution witnesses at the close of the prosecution's case, because, at the time of our hearing this reference, the burden of proof beyond a reasonable doubt at the close of the prosecution's case as enjoined by the ratio of the Arulpragasan's case would be applicable subject to what we have to say about the latest amendment to the Criminal Procedure Code (FMS Cap 6).*

C ...

The true position of the legal burden of proof at the close of the prosecution's case with regard to the amendment to the Criminal Procedure Code in question would have to be dealt with as the said amendment had already come into effect before we heard this criminal reference. We should deal with it presently.

D ...

The said amendment would apply, in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test laid down in Arulpragasan's case, ie, that of proof beyond a reasonable doubt at the close of the prosecution's case, would E *still apply*. We have to and we would presently give our reasons for saying so.

Parliament has plenary power to make retrospective criminal and civil law *vide Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, but when it makes such retrospective criminal law, it must steer clear of art 7, or for the purpose of the instant case, art 7(1) of the Federal Constitution.

F (emphasis added)

[60] In the present case, both factors mentioned in *Dalip Bhagwan* case above are absent – conflicting apex court's decisions or *per incuriam*. In fact, *TR Sandah 1* has gone through at least three judicial scrutinies in *TR Sandah 2*, *Jeli Anak Naga* and *Binglai Anak Buassan* and in these cases, the ruling on G *Pemakai Menoa* and *Pulau Galau* by Md Raus Sharif PCA supported by Ahmad Maarop FCJ was not shown to be made *per incuriam*. There was also no prior Federal Court decision in direct conflict with *TR Sandah 1*. Therefore, the question that needs to be asked is whether there is a necessity to revisit or review *TR Sandah 1*?

H **[61]** With respect, our answer is that we do not find the need to do so. In the Federal Court case of *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259 ("*Tunde Apatira*"), the prosecution invited the court to depart from its ruling against double presumption in *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273 that was argued to be wrongly decided and I ought no longer to be applied. In rejecting the prosecution's submission on the alleged errors in *Muhammed Hassan* (*supra*), Gopal Sri Ram JCA delivering the judgment of the court stated three reasons for such rejection

– recent superior court decision; certainty; and the logic and reasoning of earlier decision based on the construction of statutory provision. He held as follows:

> With respect, we are unable to accept the learned deputy's invitation to depart from *Muhammed bin Hassan* for three reasons. In the first place *Muhammed bin Hassan* **is a very recent decision of this court**.
>
> **It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions**. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as *R v. Shivpuri* [1986] 2 All ER 334.
>
> The second reason is closely connected to the first. **It also has to do with certainty in the law. The decision in *Muhammed bin Hassan* has been affirmed by our courts** (see, *PP v. Ong Cheng Heong* [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example *Haryadi Dadeh v. PP* [2000] 4 MLJ 71. If we accept the learned deputy's invitation to depart from *Muhammed bin Hassan*, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the courts.
>
> Lastly – **and this is the most important reason** – we agree with the interpretation placed by the learned Chief Judge of Sabah and Sarawak on s. 37(da) of the Act. **The logic and reasoning for interpreting that subsection in the way in which it was done in *Muhammed bin Hassan* appear sufficiently from the judgment in that case**. It requires no repetition. All we need say is that para. (da) of s. 37 is differently constructed from para. (d) of that section and must therefore carry a different meaning. As the Act is a penal statute, any ambiguity in language should be resolved in an accused's favour: *Sweet v. Parsley* [1970] AC 132.
>
> For the foregoing reasons, we reject the argument of the respondent to the effect that *Muhammed bin Hassan* was wrongly decided and ought no longer to be applied.
>
> (emphasis added)

[62] In fact, the decision of the Federal Court in *Muhammed Hassan* was also attacked by the prosecution who sought to revisit the ruling on the "double presumption" in subsequent case of *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 2 MLJ 685, where, by a majority of 6:1, it was held that there was no valid basis or justification for revisiting *Muhammed Hassan*.

[63] Applying the above guidance, in particular the third reason on the aspect of interpreting the law in *Tunde Apatira* (*supra*), we found that the ruling on *Pemakai Menoa* and *Pulau Galau* was based on an extensive assessment of the laws – both written and unwritten. And the differences, if any, between the judges in *TR Sandah 1* were due to their individual interpretation and construction of the written laws *vis-à-vis* the unwritten law – the customary law. It is therefore not appropriate for this court to determine whether or not they interpreted or applied the law correctly, for that is a matter of opinion (*Asean Security*).

[64] Moreover, the ruling in *TR Sandah 1* has been addressed through a legislative intervention by way of amendments made to the Sarawak Land Code in 2018. Such intervention is what the Federal Court in *Dalip Bhagwan* case had referred to as "the correction of error was normally dependent on the legislative process".

***Pemakai Menoa* and *Pulau Galau* - termed as "Native Territorial Domain" in 2018 Amendments**

[65] The appellants argued that *Pemakai Menoa* and *Pulau Galau* – the recognised customs in the 2018 amendments to the Land Code render *TR Sandah 1* as being legally obsolete and overturned.

[66] It was submitted that the amendment to the Sarawak Land Code in 2018 which came into force on 1 August 2019 had the effect of reversing the wrong ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1*, hence the need to apply the amendment to these appeals as they have not been finally concluded.

[67] In this regard, the respondents replied that s. 6A that was added to the Sarawak Land Code does not apply to the present cases because the appellants in the present appeals have not applied for the said native territorial domain ("NTD").

[68] It was further submitted that NTD under s. 6A is an additional claim above a claim for NCR under s. 5 of the Sarawak Land Code. Therefore, the 2018 amendments do not in any way nullify or reverse or overturn *TR Sandah 1*, nor does it have any retrospective effect, for these cases were filed, heard and decided at the courts below way before its date of in force on 1 August 2019.

[69] The respondents contended that the 2018 amendments also render the questions seeking to review the ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1* and *Nor Ak Nyawai* as academic because the amendments clearly recognise these customs as having the force of law subject to the requirements and limitations under the said Sarawak Land Code.

[70] It is to be emphasised at the outset that none of the posed questions of law for this court's decision explicitly requires a determination of the effects of the 2018 amendments to the Sarawak Land Code ("SLC") to *TR Sandah 1* or *TR Nyutan* or *Nor Ak Nyawai*. Nevertheless, we find that a discussion on the effects of the 2018 amendments to be inevitable for that legislative move was specifically undertaken in response to the Federal Court's decision in *TR Sandah 1* and *TR Nyutan*. We noted that all relevant parties in these appeals had submitted on the amendments, orally as well as in the written form.

[71] Clearly, one of the objectives of the 2018 amendments is to statutorily recognise *Pemakai Menoa* and *Pulau Galau* within the scheme of the present SLC, as customs having the force of law in s. 6A – but which is termed as native territorial domain for inclusiveness, on which a native communal title in perpetuity will be conferred and be treated as any title granted under the Land Code and the proprietary interest in that title would be indefeasible by virtue s. 132 of the SLC.

[72] The key aspects of s. 6A, apart from the legal recognition of *Pemakai Menoa* and *Pulau Galau*, is the issuance of native communal title in perpetuity, free of any premium, rent or other charges, in the name of a person or body of persons in trust for the native community named therein. And although the claim is limited for up to 500 hectares or 1,000 hectares accordingly, the NTD rights exercisable within the NTD may be claimed above and over a NCR under s. 5 of the SLC.

[73] The Deputy Chief Minister and Minister for Modernisation of Agriculture, Native Land and Regional Development, YB Datuk Amar Douglas Uggah Embas, on the second reading of the Land Code (Amendment) Bill, 2018 on 11 July 2018 stated in clear terms the background to the amendment and the objectives it sought to achieve in respect of *Pemakai Menoa* and *Pulau Galau* as follows:

> ... Tuan Speaker today is a historic moment for the natives of Sarawak. Why? Because we are finally going to see the light of day in respect of native land rights on *Pemakai Menoa*/*Pulau Galau* territorial domain with the tabling of this amendment bill.
>
> Tuan Speaker, the landmark outcome of this proposed Land Code (Amendment) Bill, 2018 is to enable native communal title in perpetuity to be issued over an area to be described as native territorial domain ...

Tuan Speaker, for the natives of Sarawak, land is regarded as an important part of their livelihood. Their customs and their culture revolve around their lands which are their heritage, passed on or inherited from generation to generation.

Tuan Speaker, more importantly, the natives rely on the land for farming, foraging for food, hunting, fishing and as an important source of materials for domestic purposes. Because of this cultural significance, they have very strong sentiment and attachment to their land.

By adopting the Torrens System for the State's Land Administration System, these cherished customs and practices were not all incorporated into our Land Laws for the creation or acquisition of ownership and proprietary rights to land which the natives have long regarded as their ancestral land. Specifically, our written laws did not expressly stipulate the existence of customs *Pemakai Menoa* and *Pulau Galau*, or the equivalent native territorial domain of other communities and thus this has affected its recognition.

This shortcoming in our laws is manifested in the Judgment of the Federal Court in the case of *Director of Forests, Sarawak and State Government of Sarawak v. Tuai Rumah Sandah anak Tabau and 7 Ors*, delivered on 20th December 2016. In this case, The Federal Court had ruled that the native customs of *Pemakai Menoa* and *Pulau Galau*, although practised by the Iban communities, have no force of law in Sarawak. As a result, the claim by Tuai Rumah Sandah and his anak biaks to ownership rights over land which, according to their own custom, is their *Pulau*, was dismissed by the Federal Court.

The Federal Court had also ruled that the practice of *Pemakai Menoa* and *Pulau Galau* was never recognised to have created customary rights to land by any of the laws passed by or during the Brooke's era or by the State's Legislature. *Pemakai Menoa* and *Pulau Galau* or its equivalent customs of other natives are also not expressly provided for in any of the codified Natives' Adats.

The Federal Court's decision presented the State Government with the opportunity to review the existing laws relating to the acquisition of rights to land-based upon the customs of the native communities in Sarawak. Through this review, any legal impediment to all the native communities to (awfully acquire proprietary right in land would be addressed, to meet the expectations of all native communities to get legal recognition of their rights to land acquired in accordance with their own customary laws. The Judgment of the apex court of this country has a profound impact on the rights of the natives which, in accordance with their customs, is their land. Leaving the Judgment as its stands is not an option ...

The amendments are necessary to give the customs and practices relating to territorial domain, the force of law.

Under the Bill, we use the term native territorial domain instead of *Pemakai Menoa* and *Pulau Galau* for inclusiveness – because the practice relating to native territorial domain is not only practised by the Ibans, but also all other native communities in Sarawak. In the case of *Rambli Kawi,*

Superintendent of Land and Survey, the courts have also recognised the concept of "cari makan" of the Malay is equivalent to *Pemakai Menoa* and *Pulau Galau*. Thus, this amendment is inclusive and relevant to all the natives.

Tuan Speaker, it must be noted, although the dissenting judgement of Yang Arif Zainun Ali, in *Tuai Rumah Sandah*'s case gives legal recognition to *Pemakai Menoa* and *Pulau Galau*, but such right is only limited to usufructuary rights, this means that the natives have the right to only use the resources within the *Pulau Galau* and *Pemakai Menoa* for their livelihood but they do not have any legal ownership or any propriety rights of the land within those areas.

Tuan Speaker, this Land Code (Amendment) Bill, 2018, will not only recognise but also give legal effect to the territorial domain. Clause 2 of the Bill through the definition of "native communal title" expressly provided that a title in perpetuity will be issued in accordance with section 6A over a native territorial domain and that such native communal title shall be held to be a title under the Land Code. This means, that the right under native territorial domain is a statutory proprietary right and not just limited to usufructuary right as recognised under common law and the decision in *Tuai Rumah Sandah*'s case.

[74] Upon perusing s. 6A, we are of the opinion that sub-s. 6 is a crucial provision for it places importance on the date of in force of the amendment – 1 August 2019 and the finality of court's decision in respect of a claim on NTD. Above all else, the customary practices of *Pemakai Menoa* and *Pulau Galau* have been given statutory recognition, having the force of law, the very crucial element that was found wanting or lacking by the Federal Court decisions of *TR Sandah* 1 and *TR Sandah 2* that had denied those customary practices legal enforceability.

[75] This provision prevents a claim for NTD to be made or allowed on any area or land where there is a final decision by a court of competent jurisdiction prior to 1 August 2019. Sub-section 6 of s. 6A reads as follows:

(6) Any claim for a native territorial domain shall not be made or allowed in respect of any area or land where, before the coming into force of this section, there is a final decision by a court of competent jurisdiction that no usufructuary rights have subsisted or have been lost or abandoned by members of the native community making that claim.

[76] Considering the background to the 2018 amendments, with the introduction of s. 6A, this provision means that whatever the Federal Court has decided, as a final arbiter, as in *TR Sandah 1* or *TR Nyutan* in respect of the NCR thereof, any claim over those lands or areas concerned shall not be made or allowed, with the coming into force of the 2018 amendments on 1 August 2019 that statutorily recognised *Pemakai Menoa* and *Pulau Galau*. in other words, sub-s. 6 of s. 6A preserves those disputed area or land in *TR Sandah 1* or *TR Nyutan* from any further claim based on NTD under s. 6A.

[77] It also means that a claim for NTD can be made in respect of any area or land where there is no final decision by a court of competent jurisdiction before or after 1 August 2019. The final decision in this provision refers to a decision by the highest court of the land – the Federal Court; and not by the trial High Court or the Court of Appeal, because any decision obtained at these two stages are appealable further rendering their decision as not a "final decision" within the meaning of s. 6A(6). Unless, of course, subject to an important caveat, which is that there was no appeal filed against such decisions so obtained in the lower courts.

[78] Hence, although the 2018 amendments to the SLC do not contain any express provision to say that those amendments are intended for it to operate retrospectively, the words in s. 6A(6) in respect of the NTD provide a "saving" clause to courts' decisions that had been finally decided prior to 1 August 2019, as opposed to those which have not been finally decided, as either pending trial, or appeals which have yet to be finally determined.

[79] The 2018 amendments have the effect of statutorily overturning the ruling in *TR Sandah 1* in respect of *Pemakai Menoa* and *Pulau Galau* effectively on 1 August 2019. In other words, the majority ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1* stands as good law from the date of its decision on 20 December 2016 until 31 July 2019. And all final decisions following *TR Sandah 1* handed down before 1 August 2019 are, by necessary implication, similarly preserved.

[80] Based on the foregoing deliberations, to revert to the questions of law on the need to review or depart from earlier decision in *TR Sandah 1*, *TR Nyutan*; to assess the correctness of the Court of Appeal statement in *Nor Ak Nyawai*, our answers are as follows.

[81] On the question of law in case A as to whether it is correct in law or proper for the Court of Appeal to set aside the trial judge's finding of fact based on the application of the decision in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1, our answer is in the affirmative.

[82] It is to be highlighted that when the Court of Appeal heard and decided the appeal on 13 July 2017, it was still legally bound by the principle of *stare decisis* to follow the ruling of the Federal Court made on 20 December 2016. We refer specifically to the guidance by the Federal Court in *Dalip Bhagwan*'s case as stated at para. [56] of this judgment.

[83] As for the question of law in case B as to whether the majority decision of Federal Court in *Director Of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Other Appeals* [2017] 3 CLJ 1 with respect to customary practices of *Pemakai Menoa* and *Pulau Galau* should be reviewed, and overturned, and *Pemakai Menoa* and *Pulau Galau* be restored as customary practices having the force of law, our answer is in the negative based on the reasons stated above

at paras. [54] to [78]. As explained, *Pemakai Menoa* and *Pulau Galau* are customs having statutory force in the current scheme of a communal title in s. 6A of the SLC as opposed to individual title.

[84] As for question (i) in case C in respect of the correctness or otherwise of the decision of the Court of Appeal in *Nor Ak Nyawai* that the rights of the natives are confined to the area where they settled and not where they foraged for food, our answer is in the affirmative for reasons stated at paras. [54] to [78] above, in particular that this question has been dealt with quite extensively by this court in *TR Sandah 1* which upheld and affirmed the said statement by the Court of Appeal; and so, the same question was posed in *Jeli Anak Naga* and was answered affirmatively as well. We find there is no valid reason for reviewing or revisiting the correctness or otherwise of the Court of Appeal's said decision, especially when this matter has been put to rest by the 2018 amendments to the SLC, acknowledging *Pemakai Menoa* and *Pulau Galau* as part of legally enforceable NCR.

[85] As a corollary, by answering question (i) of case C above in the affirmative, the question (ii) as to whether the alleged practice of the Iban to preserve an area of jungle or forests as *Pulau* for access for food, wildlife and forest produce, gives rise to exclusive rights to the land in the *Pulau* shall be answered in the negative.

[86] As for the question in case D which asks whether the Federal Court should depart from the decision of the Federal Court in *TR Sandah 1* on the question of *Pemakai Menoa* and *Pulau Galau* having no force of law and that of *TR Nyutan* on the indefeasibility of the lease of State land and if so, whether those cases have any significant bearing on the decision of the learned Judicial Commissioner in any event, our answer to the first part of the question is in the negative. The reasons are as stated in paras. [54] to [78] above. At the risk of repetition, we shall state that those decisions in *TR Sandah 1* and *TR Nyutan* stand as good law as at the date of the pronouncement of those judgments until the date of in force of the 2018 amendments of the SLC on 1 August 2019.

[87] And effectively, those decisions shall have significant bearing on the decision of the learned Judicial Commissioner at the time of his decision on 17 January 2018. The case of *TR Nyutan* shall be elaborated further in the latter part of this judgment.

[88] At the risk of repetition, when the High Court and the Court of Appeal heard these cases, the legal position on *Pemakai Menoa* and *Pulau Galau* and the question of indefeasibility of title and extinguishment (which will be elaborated later) were still governed by the ruling in *TR Sandah 1* and *TR Nyutan* respectively.

[89] Based on the foregoing reasons, on the main question of reviewing or revisiting the case of *TR Sandah 1* and *TR Nyutan*, we find that there is no reason for so departing from those decisions; and hence, the application of

these decisions by the courts below, in their decisions which were made prior to the date of in force of the 2018 amendments to the SLC, was correct and proper as those decisions stand good law until the legislative intervention which takes effect on 1 August 2019.

TR Nyutan – On Indefeasibility Of Title And Extinguishment Of NCR

[90] Three questions of law relate to the issue of indefeasibility of title and extinguishment of NCR in these appeals. They are questions 3 and 4 in case C and part of the question posed in case D, as follows:

> Case C
>
> (iii) Whether an extinguishment exercise of native customary rights over land as provided under section 15 of the Sarawak Land Code (Cap. 81) is required prior to the alienation of lease of state land; and
>
> (iv) If the answer to (iii) is in the affirmative, whether the lease of state land alienated without prior extinguishment of native customary rights is therefore null and void and/or the areas encumbered with native customary rights to be excised out or excluded from the lease of state land.
>
> Case D
>
> Whether the Federal Court should depart from the decision of the Federal Court in ... *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* [2018] 1 CLJ 19; [2018] 1 MLJ 77 on the indefeasibility of the Lease of State Land and if so, whether those cases have any significant bearing on the decision of the Learned Judicial Commissioner in any event?

What Does *TR Nyutan* Decide?

[91] The Federal Court in *TR Nyutan* held that unless there is proof of fraud, "s. 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it could be shown that NCR had been created over land in the manner prescribed under the same Code. A claim for NCR does not defeat the indefeasibility of title of land, even though the interest stated in the issue document of title was issued after NCR was asserted."

[92] The Federal Court further held that "the proper remedy for the infringement of NCR as a result of the issuance of title or alienation of NCR, where such rights subsist without extinguishment thereof, is an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties."

The Parties' Submissions

[93] It was submitted on behalf of the appellants that alienation of NCR land prior to its legal extinguishment under the Sarawak Land Code is illegal, void and of no effect and consequently the question of indefeasibility of title under s. 132 of the SLC does not arise or becomes irrelevant.

[94] It was further claimed that indefeasibility of title can be set aside not only on the basis of fraud but also on grounds of insufficient or void instrument or where the title or interest is unlawfully acquired – based on the clear words of "subject to this Code" appearing at the opening of s. 132. Indefeasibility of title in s. 132 must therefore be examined together with other provisions in the SLC.

[95] Hence, *TR Nyutan*'s decision on indefeasibility of title must not only be distinguished due to the factual and contextual differences of that case and the present appeals, but also be overruled for lack of clarity on the "net effect of the principle of indefeasibility" which is subject to certain circumstances, which in the context of the SLC, be subject to other provisions of the SLC – in this case, on the rights of the natives to NCR land.

[96] In this respect, NCR over a land is argued to be an encumbrance on the radical title held by the State, as well as on the title held by a registered proprietor. Therefore, the issuance of a lease does not automatically confer indefeasibility of title if NCR is proven to be within the said lease.

[97] Consequently, where NCR exists, alienation of the land is prohibited until and unless there is prior extinguishment of the said NCR, based on s. 15. Furthermore, the SLC does not provide for automatic extinguishment or termination of NCR once a provisional lease is issued. Other provisions were highlighted as conferring statutory protections to NCR. They are ss. 4(4), 5(3), 13(1), 15, 18 and 28 of the SLC.

[98] The respondents on the other hand argued that based on the decision of the Federal Court in *Husli Mok v. Superintendent Of Lands & Surveys & Anor* [2014] 9 CLJ 733; [2014] 6 MLJ 766 ("*Husli*") and *TR Nyutan*, alienation of the disputed land to third parties had the effect of extinguishing NCR, hence the right to seek for compensation from the State is provided under s. 197 of the SLC.

[99] The respondents also cited the case of *Mabo And Others v. Queensland (No. 2)* [1992] HCA 23; [1992] 175 CLR 1 to show that at common law, if the sovereign Government grants an interest to another party which is inconsistent with the native rights, then this extinguishes the native title for the area concerned.

[100] Moreover, the respondents argued that fraud was never pleaded in these appeals, and as such the registered proprietor held indefeasible title to the land in question.

[101] On the issue of indefeasibility of title, the respondents further submitted that the 2018 amendments affect provisional lease only and not a lease proper. Therefore, a registered proprietor issued with a lease of State land holds an indefeasible title.

A **Is NCR A Factor Subjecting Indefeasibility Of Title?**

[102] It is undeniable, at first blush, that the argument advanced by the appellant on the reading of s. 132 of the SLC is rather compelling – that what controls indefeasibility of title is not only confined to what has been expressly stated in the said provision – namely, the fraud factor, but also B other vitiating factors – such as, the NCR, based on the opening words of s. 132 – "Subject to this Code".

[103] Section 132 of the SLC reads:

> (1) **Subject to this Code**, the registered proprietor of any estate or interest C in land to which this section applies shall, **except in the case of fraud**, hold such estate or interest subject to the interests noted on the Register but free from all other interest except ...
>
> (emphasis added)

The Variations Of The Meaning Of Words In The Phrase "Subject To"

D **[104]** The meaning of "subject to" has been defined by the Federal Court in *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 4 CLJ 12; [2016] 2 MLJ 309 as "conditional or dependent upon something", indicating that the provision containing such words "does not stand alone on its own and must not be read on its own". Hence, the E words in the phrase "subject to" must be a factor to be considered in interpreting any section in a statute. In the context of that case, the term "subject to" in the beginning of s. 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993 is not merely an enabler, but is an important part of the provision which may determine the manner in which the F provision is to be read and construed.

[105] In *Government Of The Federation Of Malaya v. Surinder Singh Kanda* [1960] 1 LNS 30; [1961] 1 MLJ 121, the main issue relates to the construction of the meaning of "subject to the provisions of any existing law" in art. 140(1) of the Federal Constitution and "Subject to the provisions of G any existing law and to the provisions of this Constitution" in art. 144(1) of the Federal Constitution. Thomson CJ considered the words "subject to" as words of limitation or restriction in conformity with what was said in *Smith v. London Transport Executive* [1951] AC 555, 565; [1951] 1 All ER 667 where Lord Simonds stated that the words "are apt to enact that the powers H thereafter given are subject to restrictions or limitations to be found elsewhere". His Lordship further said:

> The words 'subject to the provisions of this Act' ... are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found.

I **[106]** Neal J (dissenting) in his endeavour to ascertain the meaning of the words "subject to", found that the words are given not one meaning but varied meanings. We reproduce below what Neal J had thereby stated, like so:

I have searched – and I hope diligently – the various authorities in which the words, "subject to," have been the subject of construction by the courts ... My research in the law reports and textbooks of the British Commonwealth has shown that the courts have given to the words, "subject to," not one meaning but varied meanings. They range from the words, "subject to," having the effect of the words following it negativing the statement preceding it as is particularly to be noticed in the long-line of authorities dealing with the phrase, "subject to contract," "subject to lease," etc. This particular meaning of the phrase, "subject to," was referred to by Stout C.J. in the New Zealand case of *Benge & Pratt v. Guardian Assurance Company* [1915] 34 NZLR 81 86 when he said, 'subject to' must mean from that point of view 'swallowed up' or 'negatived by'. The meanings in the various authorities in the British Commonwealth go to the other extreme in limiting their effect as did Denman C.J., in *Rex v. Churchwardens of St James, Westminster* 111 ER 1213 1217 when he said, "The language is not entirely free from doubt; but, considering that a certain custom had long prevailed without question, the phrase, 'subject to the laws and statutes now in force', must be taken as a description of the existing practice". This diversity of meaning and the need to consider the entire document are emphasised when we note in two decisions of the Privy Council one year apart the judgment of the same Law Lord, Lord Simonds, where the words, "subject to", are given the contradictory meanings of "without prejudice to" that is to say with no restriction on what is being qualified and "the words subject ... are naturally words of restriction". The two cases I refer to are *Smith v. London Transport Executive* [1951] AC 555 565 [1951] 1 All ER 667 and *Akistan Apena of Iporo v. Akinwande Thomas* [1950] AC 227 234. Remembering the words of Maugham J., in *In re Dunkley v. Sullivan* [1930] 1 Ch 84 87 [1929] All ER Rep 564 where he held that the words, "subject to the provisions contained in the will", must mean "subject to all the provisions of the will which remain operative and effective," I have come to the conclusion that the meaning which reading the Constitution as an entirety and having regard to the consideration of what is happening on the granting of a fresh Constitution, I ought to give to the words, "subject to", is following Denman C.J. "Subject to the procedural limitations of," or alternatively to follow the wording of Lord Simonds in *Smith's* case and to say the jurisdiction is given to be exercised "within the restrictions or limitations imposed by," and this meaning is well within the limits of the range of meanings given to the words, "subject to", by the courts throughout the British Commonwealth; and although I deprecate – as has been done by others before me – extracting a word from its context to ascertain its meaning, having extracted it I see no reason for altering or doubting the correctness of the interpretation I have given it as a whole.

[107] On appeal to the Privy Council as reported in *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169, Lord Denning disagreed with the interpretation adopted by the majority and held that the words "subject to the provisions of any existing law" in art. 144(1) meant only that the Police Service Commission shall operate pursuant to existing laws which are not in conflict with the

Constitution. In case of conflict between existing law and the Constitution the latter must prevail and as such it is necessary for the court to modify the existing law under the authority of art. 162.

[108] The variation given to the meaning of the words "subject to" as shown by Neal J is reflected in the current decision of the Federal Court in *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 6 CLJ 471; [2021] 4 MLJ 236 where Rohana Yusuf PCA interpreted the words "subject to the provisions of this part" as requiring a holistic reading of the entire provisions relating to citizenship including the main article, the qualifications provisions in Part II of the Second Schedule and the interpretation section of the supplementary provisions relating to citizenship in Part III of the Second Schedule, without severing one part from another.

[109] On the other hand, Nallini Pathmanathan FCJ describes the words "subject to" as having two possible meanings – as a referencing phrase, to cross-refer one provision to another which has the effect of linking a main provision to an exception or variants to the main rule; or as a phrase introducing a conditional provision. In the context of the case, Her Ladyship viewed that the words "subject to" serve the purpose of conjoining or bridging the governing provisions with Parts II and III of the Second Schedule. Hence the words "subject to" in s. 1 Part II, comprise a cross-reference to Part III, if and where relevant; and the words "subject to" in s. 1 Part II do not have the effect of imposing a condition because an interpretive section providing for variants and exceptions to the primary rule cannot override the central thrust of a right to citizenship. This approach of interpretation was similarly adopted by Tengku Maimun Tuan Mat CJ, that supplementary provisions in Part III of the Second Schedule cannot be read as qualifying or conditionalising the application of Part II by virtue of the phrase "subject to the provisions of Part III of this Constitution" as appearing in s. 1 of Part II of the Second Schedule.

[110] The variation in interpreting the words "subject to" is also evident in the Singapore case of *PP v. Richard Kwan* [1970] 1 LNS 117; [1970] 2 MLJ 286 (CCA) where Wee Chong Jin CJ considered that the expressions "subject to this Code" and "subject to the other provisions of this Code" in the Criminal Procedure Code as having exactly the same meaning and that these expressions mean no more than to draw the attention of everyone that the particular section in which either of these two expressions appear may be qualified by other provisions of the Enactment. Yong Pung How CJ in *Ramanathan Yogendran v. PP* [1995] 2 SLR 563, when referring to *Richard Kwan*, however stated that the word "qualified" in *Richard Kwan* does not connote the meaning of "restriction" or "curtailment". He opined that the common occurrence of the words "subject to" does not, and indeed cannot, connote that one section overrides the other. It means that in reading one section, one should take the other into account.

[111] Clearly, the variations that exist in construing the meaning of the words "subject to" show that interpreting the said words is not entirely free from difficulty despite its seemingly innocuous brevity, as expressed in just a two-word phrase. On the one hand, it is treated as qualifying, restricting or conditioning the application of a provision, and on the other hand, it is treated as merely linking a provision to another which is to be read and applied, if and where relevant, without making a provision overriding another.

Understanding The Code And Its Scheme – Avoiding Speculation Of Policy Or Intent

[112] In attempting to discover the meaning of the words "subject to this Code" we find it crucial to understand the entire scheme of the SIC – which provides for a legislative framework for the classification of land; alienation of State land; administration of alienated land; settlement of native customary rights; cadastral survey; registration of dealings in land; the development of land; offences and sanctions; arbitration; and some procedural matters – all in ten parts of 248 sections and two schedules.

[113] Reading a statute as a whole in the quest of understanding its entire scheme is what is considered the elementary rule by Viscount Simonds in *AG v. Prince Ernest Augustus of Hanover* [1957] AC 436 (HL) that:

> ... the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.

[114] And reading a statute as a whole includes reading the amendments that have come into force and the related provisions which are capable of shedding light on the interpretive problem at hand. As stated by Lord Reid in *Inland Revenue Commissioners v. Hinchy* [1960] 1 All ER 505 (HL):

> One assumes that, in drafting one clause of a bill, the draftsman had in mind the language and substance of other clauses and attributes to Parliament a comprehension of the whole Act.

[115] And that is because of the presumption that the Legislature is competent and well-informed, that the language is used consistently, that tautology is avoided, that the provisions of an Act all fit together to form a coherent and workable scheme. (*Sullivan on the Construction of Statutes*, 6th edn, LexisNexis, 2014 at p. 405).

[116] In the process of understanding the SLC, we discovered that the words "subject to this Code" appear not only in s. 132(1) but also in three other places in the SLC – s. 29(1) on temporary licenses; s. 88 on general powers of settlement officer; and s. 130(2) on joint tenants.

[117] Bearing in mind the existence of the same words in other parts of SLC, it is crucial that in an attempt to define the meaning of "subject to this Code", we must not lose sight of the effects of the meaning that will be given to the

words "subject to this Code" to the operation of other parts of the provisions which employ similar words – for consistency and clarity in interpreting statutory provision is imperative.

[118] Moreover, it is presumed that the Legislature uses language carefully and consistently so that within a statute, the same words have the same meaning and different words have different meanings – because "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation" (*R v. Zeolkowski* [1989] 1 SCR 1378). Hence, when the same words or expressions appear more than once in a statute, they should receive the same meaning unless the context suggests otherwise, or a contrary intention inevitably or irresistibly appears (*NS Bindra's Interpretation of Statutes*, 9th edn, 2002 at p. 645).

[119] In the context of the present case before us, the phrase employed in the beginning of s. 132 of the SLC is "subject to this Code". The Code refers to the Sarawak Land Code in its entirety. And we know the Sarawak Land Code deals not only with NCR but a variety of other matters – alienation, registration, procedural provisions, power conferring provisions, entitlements, rights and liabilities, offences, dispute resolution provisions, to name but a few.

[120] Now, with reference to the Sarawak Land Code generally, though *prima facie*, it appears not to be problematic nevertheless, it becomes less than clear, according to the appellants, when applied in the context of the question – namely, as to whether NCR is a factor qualifying indefeasibility. As the High Court of Australia noted in *Bowtell v. Goldsbrough, Mort And Company Ltd* [1905] 3 CLR 444; [1905] 12 ALR 82; [1905] 23 WN (NSW) 40i; [1905] HCA in the words of O'Connor J that "When general words are used in a statute, it sometimes becomes doubtful when the statute is applied to its subject matter, whether the Legislature intended the words to be used in a general, unrestricted sense, or with special reference to the subject to which they relate." His Lordship referred to Maxwell, *Interpretation of Statutes* (3rd edn), at p. 28 that "General words":

> I admit of indefinite extension or restriction, according to the subjects to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise, also, much that was not; or, be so restricted in meaning as not to reach all the cases which fail within the real intention. Even, therefore, where there is no indistinctness or conflict of thought, or carelessness of expression in a Statute, there is enough in the vagueness and elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment with the degree of accuracy necessary for determining whether a particular case falls within it.

[121] In so identifying which aspect in the "Code", apart from fraud (which is specifically stated in s. 132), is a factor qualifying indefeasibility, we find the exercise is arbitrary – for that path would compel us to pick and choose

matters that fall within the general "Code" as qualifying indefeasibility. It is also trite that an interpretation of statutory provision that leads to unpredictable, ambiguous result ought to be avoided.

[122] At this juncture, we can do no better than to quote the statement by Burton J in *Warburton v. Loveland d Ivie* [1828] 1 Hud & B 623 which was later affirmed by the House of Lords:

> **I admit that the generality of words may properly be restrained within the limits of the declared or implied policy of the statute**, the more especially if a construction, to the full extent of its phrase, would lead to any repugnance or inconsistency in its provision. **That policy is, however, I conceive, only to be looked for in the statute itself, and not to be either enlarged or contracted, upon merely speculative grounds** – a mode of construction that always incurs the hazard, and has, perhaps in some instances, produced the effect of legislating in the form of exposition.
>
> (emphasis added)

[123] As a piece of legislation for the administration of land in Sarawak, the SLC was promulgated to feature the Torrens system – a system of land title by registration, through which a registered proprietor shall hold indefeasible title to the land. It is also a written law that acknowledges the NCR. This is clearly evident in various sections specifically for regulating NCR related matters – they are ss. 2, 4, 5, 6, 6A, 10, 13, 15, 18, 18A, 28, 82, 197.

[124] While NCR is statutorily acknowledged, does it mean that it is the policy of the SLC or the intent of the Legislature to regard it as a factor qualifying indefeasibility, as envisaged by that phrase posturing itself as the opening *salvo* in s. 132(1) of the SLC? With respect, in the absence of a clear and unambiguous express provision to that effect, we are not ready to conclude that the NCR, in the scheme of the SLC makes a qualifying factor to indefeasibility of title. As it stands now, fraud is the only stated factor, if pleaded and established by the party who asserts it, that could render a registered title defeasible. Even a failure to comply with s. 15 of the SLC on extinguishment prior to alienation could not defeat a registered title so obtained. The apex court had so concluded, as could be seen in *TR Nyutan*'s case that the remedy open to the aggrieved party lies in damages by way of compensation, under s. 197 of the SLC.

[125] In this regard, considering the variation in the definition of the words "subject to" as discussed above, we are of the considered opinion that the phrase "subject to this Code" in s. 132(1) does not make the NCR as the qualifying factor to indefeasibility other than what is expressly stated therein – the "fraud factor".

[126] In coming to this conclusion, we considered the 2018 amendments that introduce the concept of deferred indefeasibility of title for provisional lease – and not a lease proper – as the legislative response to the controversial

issue of indefeasibility of title and the question of extinguishment of NCR resulting from the decision of the Federal Court in *TR Nyutan*. As highlighted by the Minister in charge of tabling the 2018 amendments that:

> The recent Federal Court case of *TR Nyutan & Others v. TH Holdings & Others* [2017] also had adverse implications on native customary rights to land in Sarawak. The issue in *TR Nyutan* case involved claim of Native Customary rights within an area over which a Provisional Lease had been issued to a private company. The court ruled that while claims of native customary rights are proven, the rightful claimants are only entitled to be paid compensation but could not claim back the land since the Provisional Lease was later registered as a lease in the Land Office, thereby conferring indefeasibility of title on the registered owner thereof.
>
> To address the problem arising from *TR Nyutan* case, the proposed amendment also introduces the principle of deferred indefeasibility for any Provisional Lease issued under Section 28 of Land Code. This amendment will further safeguard the interests of the natives over native customary rights land and rights over native territorial domain to ensure that land held under such rights of the natives would not be included in any area intended to be covered by a Provisional Lease.
>
> It is thus proposed that Section 28 of the Land Code be amended, so that upon completion of a final survey of the land covered by a Provisional Lease, land held by native customary rights or within a native territorial domain must be excluded from the Provisional Lease. In other words, the Provisional Lease does not enjoy the statutory protection of the principle of indefeasibility of title under the Torrens Land System, until and unless:
>
> (a) a final survey of the land to be alienated has been completed; and
>
> (b) all land held by natives under native customary rights by virtue of Section 5 of the Land Code and/or land under a native territorial domain have been excluded.

[127] The 2018 amendments therefore prohibit alienation of State land before a completion of a survey, which shall allow exclusion of NCR under s. 5 or NTD under s. 6A from the area covered by the provisional lease and denial of registration of a lease proper if the area is already held under NCR or NTD respectively. Consequently, anyone holding a provisional lease shall not be entitled to an indefeasibility of title under s. 132 of the SLC.

[128] On the question of extinguishment of NCR, we find that the SLC is clearly protective of NCR whereby alienation of State land or use for a public purpose are prohibited for land which is encumbered with NCR lawfully created under s. 5 or land which has been issued with native communal title under s. 6A until and unless all native customary rights have been surrendered or extinguished or provisions for compensating the persons entitled thereto have been made (s. 15(1)).

[129] Section 5(3) of the SLC too provides proper procedures for extinguishment of NCR created under the said provision whereby compensation shall be paid for (i) the planting of land with fruit trees; and

(ii) the occupation or cultivation of land; or by providing other land over which such rights may be exercised, with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

[130] Interestingly, the SLC also provides a presumption clause in respect of a claim for NCR over State land, whereby "whenever any dispute shall arise as to whether any native customary rights exist or subsist over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights (s. 5(7)). As a corollary, before any question of extinguishment arises there must be first proof of the lawful creation or the existence of NCR over the State land.

[131] Reverting to the questions posed, we shall answer the questions as to whether an extinguishment exercise of native customary rights over land as provided under s. 15 of the Sarawak Land Code is required prior to the alienation of lease of State land in the affirmative.

[132] However, as to whether the lease of State land alienated without prior extinguishment of native customary rights is therefore null and void and/or the areas encumbered with native customary rights to be excised out or excluded from the lease of State land, the answer is not straightforward, as we notice that this aspect is not provided for in s. 15 of the SLC.

[133] In such absence, we find it necessary to look at the entire SLC relating to the issues of extinguishment, indefeasibility of title and NCR in order to understand their relationships within the scheme of the Land Code as a whole, bearing in mind the 2018 amendments that mandated the exclusion of NCR under s. 5 or NTD under s. 6A in provisional lease prior to its registration to a lease proper.

[134] In this respect, there is a statutory obligation on the part of the authority to conduct a survey before alienation so as to avoid inclusion of NCR or NTD in the grant of a provisional lease and the lease proper.

[135] After due deliberation of all the relevant provisions in the SLC, and having concluded that NCR is not a factor qualifying indefeasibility of title, any native who is deprived of his NCR by reason of alienation may find the remedy in s. 197 of the SLC, which provides as follows:

> Any person who is deprived of any land or of any estate or interest therein, by reason of any of the provisions relating to indefeasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.

[136] This is what the Federal Court had decided in *Husli* that "upon alienation of the land to SEDC the rights of the deceased to the land had been extinguished or he had been deprived of the land and his right to seek compensation against the Government under s. 197 of the Land Code accrued."

[137] Taking into consideration the legislative intervention in curing the effects of *TR Nyutan*, we do not find the need to depart therefrom, and as such the question framed as to "whether the Federal Court should depart from the decision of *TR Nyutan*" shall be answered in the negative.

The Effects Of The 2018 Amendments Of The Sarawak Land Code – Retrospectivity Or Prospectivity

[138] The appellants argued that the 2018 amendments apply retrospectively to solve problems arising from the Federal Court decision in *TR Sandah 1* and *TR Nyutan* – which is clearly stated in the Hansard. In any event, the appellants contended that these appeals are ongoing, and the Court of Appeal is not the final arbiter. Therefore, as the amendments are currently in full effect, the question of retrospective application of this new law is irrelevant and the Federal Court is bound to follow the statutory law as opposed to the ruling in earlier decisions which mischief is sought to be rectified by that amending law.

[139] The respondents on the other hand argued that the 2018 amendments ought to operate prospectively from the date of it taking into effect on 1 August 2019 because it is trite law that an Act or Ordinance that affects substantive rights of the parties should not be retrospective, and the SLC is one such legislation. As such, the court is to apply the law as it exists at the time of hearing and not after. It was further argued that even if the amendment has retrospective effect (which is denied), it only affects provisional lease and not a lease proper.

Judicial Ruling Versus Statutory Law – Retrospective Versus Prospective Effects

[140] It would be appropriate at this juncture to highlight this aspect of retrospective and prospective effect of an amending law – in judicial ruling and in statute, because this is what the crux of the matter in the present appeals is about – the extent of the application of the Federal Court's ruling in *TR Sandah 1* and *TR Nyutan vis-à-vis* the 2018 amendments to SLC.

[141] It is trite legal principle that a legislative change in a statute is not intended to have a retrospective effect "unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction ..." (*Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals* [2020] 1 CLJ 193; [2020] 1 MLJ 311).

[142] In fact, there is, at common law, a general rule "that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events (Sir Owen Dixon CJ in *Maxwell v. Murphy* [1957] 96 CLR 261).

[143] There is however a stark difference between the effects of a judicial ruling and that of a statute in respect of their retrospectivity and prospectivity, which we found as clearly articulated in the words of Lord Goff in *Kleinwort Benson Ltd v. Lincoln City Council* [1998] 3 WLR 1095 (HL) when His Lordship compared the retrospective effects of a judicial ruling as opposed to the prospective effect of a statute, such that:

> Bearing these matters in mind, the law which the judge then states to be applicable to the case before him is the law which, as so developed, is perceived by him as applying not only to the case before him, but to all other comparable cases, as a congruent part of the body of the law. Moreover, when he states the applicable principles of law, the judge is declaring these as constituting the law relevant to his decision. Subject to consideration by appellate tribunals, and (within limits) by judges of equal jurisdiction, what he states to be the law will, generally speaking, be applicable not only to the case before him but, as part of the common law, to other comparable cases which come before the courts, whenever the events which are the subject of those cases in fact occurred.
>
> It is in this context that we have to reinterpret the declaratory theory of judicial decision. We can see that, in fact, it does not presume the existence of an ideal system of the common law, which the judges from time to time reveal in their decisions. The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, *when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect*. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which the events must have occurred sometime, perhaps some years, before the judge's decision is made. But it is also inevitable in relation to other cases in which the law as so stated will in future fail to be applied. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is being applied equally to all and yet be capable of organic change.
>
> ... I recognise, of course, that the situation may be different where the law is subject to legislative change. *That is because legislation takes effect from the moment when it becomes law, and is only retrospective in its effect to the extent that this is provided for in the legislative instrument*. Moreover, even where it is retrospective, it has the effect that as from the date of the legislation a new legal provision will apply retrospectively in place of that previously applicable.
>
> (emphasis added)

[144] There is however a limitation in the retrospectivity of a judicial ruling as described by Lord Nicholls in *Spectrum Plus Ltd, Re; National Westminster Bank plc v. Spectrum Plus Ltd* [2005] UKHL 41 (HL) who observed that:

> [26] ... The retrospective nature of a court ruling on a point of law means that the ruling applies in all cases, past as well as future. This is subject only to defences of general application, such as limitation, laches, and *res judicata*.

[145] And so also, when a judgment clearly states that its ruling "only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims (*Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 (FC)).

[146] Otherwise, "the law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded (*Cadder v. Her Majesty's Advocate* [2010] UKSC 43 per Lord Hope) and to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is excluded from cases already finally determined (*Cadder v. Her Majesty's Advocate* (*supra*) per Lord Rodger). That is the common law position" (*Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697 (FC)).

[147] Abdul Malek Ahmad FCJ in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 when referring to the principle enunciated in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311 held that "... To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level".

How The 2018 Amendments Impact The Appeals

[148] Having stated the law on the retrospectivity and prospectivity of a judicial ruling and a statute, we now examine the 2018 amendments to the SLC, in finding the nature and extent of the amendments in respect of the issues on: (i) *Pemakai Menoa* and *Pulau Galau*; and (ii) deferred indefeasibility of provisional lease; and (iii) how they affect the present appeals.

[149] One of the utmost important aspects in statutory interpretation is to give effect to the legislative purpose in the 2018 amendments that was designed to suppress the mischief and advance the remedy resulting from the decision in *TR Sandah 1* and *TR Nyutan*. This mischief rule which derives its origin in *Heydon's* Case (1584) 76 ER 637; [1584] 3 Co Rep 7; [1584] 1 WLUK 42 – is a classic illustration of the role of legislative purpose as a tool of statutory interpretation which is widely cited and reprinted in statutory interpretation casebooks.

[150] According to *Heydon*:

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered: – 1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common taw did not provide. 3rd. What remedy the Parliament hath resolved and appointed

to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato*) *commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *probono publico*.

[151] As to what extent the 2018 amendments have on *TR Sandah 1* and *TR Nyutan*, the answer can be found in the Federal Court decision in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1. In *Alma Nudo (supra)*, the Federal Court had the opportunity to examine three Indian cases (*ST Sadiq v. State Of Kerala* [2015] 4 SCC 400; *Indira Nehru Gandhi v. Shri Raj Narain* [1975] 2 SCC 159; and *Medical Council of India v. State of Kerala* (Writ Petition (C) No. 178 & 231 of 2018) on the effect of the legislative intervention *vis-à-vis* a judicial decision wherein it was concluded that the power of the Legislature to amend a law which formed the basis of the decision of the court is recognised. It held that:

[84] Read in context, the three cases above do not stand for the proposition that any amendment to a law which has been interpreted by a court is an impermissible encroachment into judicial power. *On the contrary, the cases clearly recognise the power of the Legislature to amend a law which formed the basis of the decision of the court. The effect of such an amendment is not to overrule the decision of the court in that case, but to alter the legal foundation on which the judgment is founded. The earlier decision of the court then becomes unenforceable for the interpretation of the newly amended law. But the decision itself which led to the amendment is not affected*.

[85] In fact, there are plethora of decisions by the Indian Supreme Court postulating a principle to the effect that while a legislature does not have the power to render ineffective a judgment of a court, it may amend the law to alter the legal basis upon which the judgment was founded (see for instance *Janapada Sabha Chhindwara v. The Central Provinces Syndicate Ltd* [1970] 1 SCC 509 at para. 10; *State of Haryana v. Karnal Co-Op Farmers's Society Ltd* [1993] 2 SCC 363 at para. 37, *SR Bhagwat v. State of Mysore* [1995] 6 SCC 16 at para. 18). The same principle was succinctly elucidated by the Indian Supreme Court in the case of *Cauvery Water Disputes Tribunal* [1993] Supp 1 SCC 96 (II) at para. 76):

> *The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the court and thus change the law in general, which will affect a class of persons and events at large*. It cannot, however, set aside an individual decision *inter partes* and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.

[86] The distinction between amending a law to remove its defects and overruling a decision of the court was explained in *Cheviti Venkanna Yadav v. State of Telangana* [2017] 1 SCC 283:

> This plenary power to bring the statute in conformity with the legislative intent and correct the flaw pointed out by the court can have a curative and neutralising effect. *When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded*. This does not amount to statutory overruling by the legislature. *In this manner, the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation*.
>
> (emphasis added)

[152] And so, we are bound to adopt the current regime of the statutory law – the SLC – not only to cases which are yet to be filed with the courts, but also "to all pending cases and all those cases still under appeals within our court system" (*Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal* [2017] 7 CLJ 641; [2017] 5 MLJ 385 ("*Ling Peek Hoe*")).

[153] The mischief of the ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1* is what the 2018 amendments sought to suppress; and to advance a remedy in the form of s. 6A. It was a deliberate choice by the Sarawak State Legislature to give statutory force of law to the customs of *Pemakai Menoa* and *Pulau Galau* in what is termed as native territorial domain – a communal usufructuary rights having title in perpetuity. The key aspects of s. 6A are stated at para. [71] above of this judgment. In the State assembly when tabling the Bill to affect the 2018 amendments, it was said:

> The Judgment of the apex court of this country has a profound impact on the rights of the natives which, in accordance with their customs, is their land. Leaving the Judgment as its stands is not an option.
>
> ...
>
> Tuan Speaker, after the *Director of Forests Sarawak & Anor v. TR Sandah Tabau & Others* case whereby the Federal Court ruled that the native customs of *Pemakai Menoa* and *Pulau Galau* has no force of law. We have two options to respond to the Federal Court ruling. One, was to allow the controversy to be resolved in court. Second, consider a political solution. At that time, Allahyarham Pehin Sri Haji Adenan Satem ... (Applause) ... was determined and committed to respond through the option two, to go for possible political solution. Therefore, he has directed us to pursue option two and find a possible political solution to resolve the issue involving ... sorry Tuan Speaker ... *Pemakai Menoa* and *Pulau Galau* as reflected in the case of the *Director of Forests* and *TR Sandah* case.

[154] Perhaps, it must be emphasised that these appeals were based on a claim under s. 5 of the SLC – because s. 6A was not in existence yet when these appeals were heard at the courts below. And the ruling in *TR Sandah 1* on *Pemakai Menoa* and *Pulau Galau* as not having a force of law, was based on the interpretation of s. 5 of the SLC. And in seeking to address this issue,

the State Legislature deliberately chose to recognise these customs as having the force of law, and that they be regulated in the scheme of s. 6A, independently of s. 5 of the SLC.

[155] With this background, we hold that as at 1 August 2019, s. 6A of the SLC shall be the governing provision on NTD – or what is commonly referred to as *Pemakai Menoa* and *Pulau Galau* for the Iban community; and from that same date onwards, the ruling in *TR Sandah 1* that *Pemakai Menoa* and *Pulau Galau* has no force of law, is no longer a valid authority; and the court is duty-bound to give effect to the statutory law, as contained under s. 6A.

[156] Having said that however, applying s. 6A in the context of the present appeals is not without its peculiar challenges – because s. 6A, while recognising *Pemakai Menoa* and *Pulau Galau*, provides for the procedures to be followed in making such claims – to the Superintendent in such form as may be provided by the Director, to be filled in with all relevant evidence; and the director shall be the approving authority – and the appeal therefrom goes to the Minister. The role of the court in respect of s. 6A is not expressly provided for.

[157] That having been said, considering that these appeals which were commenced under s. 5 of the SLC and proceeded throughout until they reached us when the amendments have already been in force, we must, given the peculiar circumstances of these appeals, apply s. 6A, in particular sub-s. 6 of the SLC which reads:

> (6) Any claim for a native territorial domain shall not be made or allowed in respect of any area or land where, before the coming info force of this section, there is a final decision by a court of competent jurisdiction that no usufructuary rights have subsisted or have been lost or abandoned by members of the native community making that claim.

[158] As was alluded to earlier at paras. [74] to [77] above, the main effect of this provision is to prevent a claim to be made for an area or land where there is already a final NCR decision by the final court before the coming into force of this section. The clearest example is the case of *TR Sandah 1* and *TR Nyutan* – that claims over the land, premised on the practices of *Pemakai Menoa* and *Pulau Galau* in these two cases which were finally decided by the Federal Court then are not to be made or allowed. After the 2018 amendments, the very premise upon which the majority rested their findings would no longer be available. That majority decision in *TR Sandah 1* case held sway as a binding precedent for cases having the same issues, only until 31 July 2019. Post that date, the 2018 amendments would step in to rule the roost, so to speak.

[159] As regards these appeals, we hold that the decisions of the Court of Appeal as not final, because final "could only mean those cases that have already exhausted their appeal process within the court system" (*Ling Peek Hoe*).

[160] Hence, in order to do justice to these cases which are caught by the peculiar circumstance of the legislative overruling of *TR Sandah 1* and the statutory recognition of *Pemakai Menoa* and *Pulau Galau* in s. 6A, we find basis in sub-s. 6 thereof, to make the following orders:

Case A

Case No	Appellant	Respondent
01(f)-31-10/2019 (Q)	1. Busing Anak Jali 2. Lai Ak Jali 3. Nanggai Ak Liyom 4. Burai Anak Enseriban 5. Bunyie Ak Guha 6. Bunta Ak Mamut 7. Marsar Ak Aping	1. Kerajaan Negeri Sarawak 2. Jabatan Tanah dan Survei Cawangan Mukah
02(f)-77-10/2019 (Q)	1. Busing Anak Jali 2. Lai Ak Jali 3. Nanggai Ak Liyom 4. Burai Anak Enseriban 5. Bunyie Ak Guha 6. Bunta Ak Mamut 7. Marsar Ak Aping	Empire Plantation Sdn Bhd

[161] Considering the communal nature of *Pemakai Menoa* and *Pulau Galau* in s. 6A, we are of the view that an individual claim, as opposed to communal claim, cannot be sustained. The appeal in respect of case A ought to be and is hereby dismissed.

Case B

Case No	Appellant	Respondent
01(f)-32-10/2019 (Q)	1. Nikodemus Anak Singgai 2. Gubil Anak Padat 3. Sangat Ak Lasa (A representative action)	1. Superintendent of Lands and Surveys Samarahan Division 2. Director of Forest, Sarawak 3. Kerajaan Negeri Sarawak

[162] Upon our due perusal of the grounds of judgment of the Court of Appeal, we found that there was no assessment made on the finding of facts, such that the severance of 300 hectares of *Temuda* from the claimed 8,001 hectares was based on *TR Sandah 1*. As stated earlier, the Court of Appeal was right then to make such an order based on the then prevailing ruling of *TR Sandah 1*.

[163] However, with the coming into force of s. 6A, we are of the view that this appeal ought to be sent back to the Court of Appeal for a finding of fact specifically on the area where *Pemakai Menoa* and *Pulau Galau* are situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of *Pemakai Menoa* and *Pulau Galau* accordingly as allowed under

s. 6A. Any such finding would be relevant for the purpose of compensation under s. 197 of the SLC to the appellants who might have been deprived of their rights by reason of alienation of the lands to third parties.

[164] Undoubtedly, the Federal Court can and is legally entitled to make such assessment, however, by doing so, the parties are deprived of an avenue to appeal further on the matter of assessment.

[165] In respect of the size and boundary of *Pemakai Menoa* and *Pulau Galau*, we find that the limits of 500 hectares or 1,000 hectares respectively were discussed at the special task force level with consultation of Majlis Adat Istiadat Sarawak and upon further deliberation at the State Legislative assembly, as attested by the following records:

> ... These Task Force and Committee met numerous times and engaged with various stakeholders over the past year to come up with a comprehensive solution.
>
> At the same time, Majlis Adat Istiadat Sarawak (MAIS) was tasked to consult and obtain the views of the different native communities on their respective concepts, customs, cultural practices and Adats on native territorial domain.
>
> These consultations culminated into a special conference for Native Communities' Leaders held on 24th and 25th January 2018 in Kuching. The conference's resolutions and recommendations were forwarded to the State Government, which later formed one of the basis to amend certain provisions of the Land Code and which are now proposed to be incorporated in this amendment.
>
> ...
>
> Tuan Speaker, the most challenging issue before the Task Force is to recommend the size of native territorial domain. After lengthy discussions Section 6A(2) stipulated that any area claimed as native territorial domain shall not exceed five hundred hectares (500ha) or one thousand two hundred and fifty acres (1250 acres).

[166] However, upon further debate and discussion at the State Legislative Assembly, the size of the area which may be claimed for *Pemakai Menoa* and *Pulau Galau* can reach up to a maximum of 1,000 hectares.

> Tuan Speaker, 22 Honourable Members have expressed among them are the Honourable Member for Engkilili, Murum, Kedup, Batu Danau, Tasik Biru, Layar, Machang, Meluan, Sama Laju, Katibas, Bukit Bengunan, Ngemah, Krian, Tupong, Bukit Goram, Daro, Krian, Pelagus, Telang Usang, Lingga, Kalaka, Piasau all raised the issue and expressed their concern that the limit of 500 hectares the native community may claim as Native Territorial Domain under Section 6 may not be fair and just as some community requirement and need may exceed this threshold. They have suggested and proposed to the limit be increased to 1,000 hectares.

A Tuan Speaker, the Government has taken note to this suggestion and proposal as you all were aware, as all Honourable Members are aware, a Motion to amend the Bill to increase the area and the manner of proposing a Motion has been circulated to the Honourable Members of this House.

B **Case C**

Case No	Appellant	Respondent
01(i)-33-10/2019 (Q)	1. Ramba Ak Bungkong 2. Mujing Ak Ragai 3. Johnny Ak Louis Nanta 4. Jarin Ak Leng 5. Aning Ak Simon 6. Dickson Ak Jalang	1. Unus bin Tambi 2. Superintendent of Lands and Surveys, Miri Division 3. State Government of Sarawak
02(i)-79-10/2019 (Q)	1. Ramba Ak Bungkong 2. Mujing Ak Ragai 3. Johnny Ak Louis Nanta 4. Jarin Ak Leng 5. Aning Ak Simon 6. Dickson Ak Jalang	Asco Green Sdn Bhd

E **[167]** This case was disposed of summarily. While this is proper in so far as the company is concerned because of the indefeasibility of title held by them and in the absence of any allegation of fraud; a finding of fact as to whether there was NCR in the form of *Pemakai Menoa* and *Pulau Galau* over the land must be based on a full trial of the matter as against the third party, because, if it is proved that their NCR existed as a matter of established fact, the appellants are entitled to be compensated with damages under s. 197 of the SLC.

[168] It is on this basis that we find that the summary disposal of the claim by the appellants against the third party was improper merely based on the affidavit evidence. Evidence needs to be led *viva voce* subject to due cross-examination by adverse parties. And for this reason, this case is reverted to the High Court to be fully heard as between the appellants and the third party specifically on the question of whether there was NCR created or existed on the alienated land which entitled the appellants for compensation.

H **Case D**

Case No	Appellant	Respondent
02(f)-76-10/2019	1. Yahya bin Timbon 2. Mahari bin Lamat 3. Haslan bin Abu Bakar	Kumpulan Parabena Sdn Bhd

I **[169]** Upon perusal of both the judgments of the High Court and the Court of Appeal, we are satisfied based on the proper appreciation of the evidence presented, the concurrent findings had been that there was no NCR created

nor existed over the land concerned. We find no reason to disturb such findings by both the courts below. The decisions of the High Court and the Court of Appeal are hereby affirmed, and this appeal is therefore dismissed.

Conclusion

[170] Premised upon the factual matrix obtained in each of the appeals before this court, the decisions of the Court of Appeal panels following the decisions of the *TR Sandah 1* would have been impeccable had it not been for the 2018 amendments to the SLC. Those amendments that gave statutory recognition to the customary practices of *Pemakai Menoa* and *Pulau Galau* as having the force of law had rendered the ruling in *TR Sandah 1* entirely tenuous and untenable. Though the amendments preserved the apex court decisions, such saving was limited to the cut-off effective date of 1 August 2019. Post that date, all pending cases involving NCR claims for *Pemakai Menoa* and *Pulau Galau* must be subject to the provisions of the 2018 amendments. It is clear to us that the present appeals involving the same issue must be decided accordingly to give effect to the clear dictates of the 2018 amendments to the SLC.

[171] The customary rights of *Pemakai Menoa* and *Pulau Galau* are statutory communal rights governed independently under s. 6A of the SLC where there will be issuance of native communal title in perpetuity, free of any premium, rent or other charges, in the name of a person or body of persons in trust for the native community named therein.

[172] The NCR under ss. 5 and 6A are statutorily protected from alienation. They are to be excluded from provisional lease or a lease proper. Its extinguishment shall only be made according to the proper procedure in the SLC.

[173] The Torrens system is the underlying premise or foundation of the SLC which places importance on registration of title and the concept of indefeasibility. Any deprivation of an established right to land by virtue of indefeasibility shall warrant a claim against the State for compensation - such that the alienation and issue of lease without first ascertaining the existence of NCR of the claimants, damages by way of compensation under s. 197 of the SLC would be the remedy, if indeed such rights existed in favour the claimants.

[174] In the upshot, we make the orders in relation to each of the appeals accordingly, as per above. As to costs, each party to bear their own costs.

[175] Mention date for case B between *Nikodemus & Ors v. Superintendent of Lands and Surveys Samarahan Division & Ors* in Civil Appeal No. 01(f)-32-10-2019 (Q) at the Court of Appeal; and case C between *Ramba Ak Bungkong & Ors v. Unus Tambi & Ors* in Civil Appeal No. 01(i)-33-10-2019 (Q) at the High Court at Miri is fixed within 14 days from today.